

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 KICKSTARTER, INC.,

4 Plaintiff,

5 v.

11 Civ. 6909 (PAC)

6 PAN FUNDED, LLC,
7 ARTISTISHARE, INC.,

8 Defendants.
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Markman Hearing

9
10 New York, N.Y.
December 17, 2012
11 9:30 a.m.

12 Before:

13 HON. PAUL A. CROTTY

14 District Judge

15 APPEARANCES

16 STEPTOE & JOHNSON LLP
17 Attorneys for Plaintiff
18 BY: TIMOTHY BICKHAM
MICHAEL J. ALLAN

19 LANDO & ANASTASI LLP
20 Attorneys for Defendants
21 BY: CRAIG R. SMITH
WILLIAM J. SEYMOUR

1 (Case called)

2 THE COURT: Good morning. Who is going to be speaking
3 for Kickstarter?

4 MR. BICKHAM: I'll be the principal speaker. Mr.
5 Allan will say a few words, if that's all right with the Court.

6 THE COURT: How long do you want?

7 MR. BICKHAM: I believe your Honor set this hearing
8 for about three hours.

9 THE COURT: Just because I did that, you don't have to
10 take all the time. If you can do it in less time, that would
11 be fine.

12 MR. BICKHAM: We'll try to get through it quickly. If
13 we split the time evenly and say 90 minutes each side, we would
14 like to go a little bit more than an hour and then save a few
15 minutes for rebuttal.

16 THE COURT: Fine. Do you want to go ahead? How about
17 you, Mr. Smith?

18 MR. SMITH: Your Honor, it is up to you in terms of
19 how you handle it. In a claim construction here to instead of
20 having one side go and present all of its evidence on all of
21 the terms and then let the other side come up and give all of
22 their evidence, I think it is sometimes helpful to have one
23 side present on one term, have the other side present on the
24 same term, so you hear the arguments right next to each other.

25 THE COURT: That makes sense. Do you want to do it?

1 MR. BICKHAM: Your Honor, we will do it however you
2 would like. In our experience flow is much smoother if we just
3 give our presentation. Frankly, it is done most times,
4 presentation-presentation.

5 THE COURT: Go ahead, start your presentation.

6 MR. BICKHAM: Your Honor, we have some copies of our
7 slides. If I may approach?

8 THE COURT: Sure. Go ahead.

9 MR. BICKHAM: Good morning, your Honor.

10 THE COURT: Good morning.

11 MR. BICKHAM: What we would like to do is take a very
12 brief couple of minutes to go through, set the context for
13 today's hearing, to give a little bit of background, speak to
14 the legal principles just briefly, and then get right into the
15 claim terms.

16 The patent that we are talking about is U.S. patent
17 number 7,885,887. For abbreviation --

18 THE COURT: '887?

19 MR. BICKHAM: Yes, your Honor. We refer to it as the
20 '887 patent. It is directed to a method and system for raising
21 finance or revenue by an artist for a project. Essentially,
22 this is crowd funding for artists.

23 There are nine disputed claim terms. Logically they
24 fall into two categories. Category one are claims that are not
25 the software tools claims. There is fan and client, both of

1 which appear in the specification. The entitlement, including
2 at least one of the products they service in a patronage, is
3 actually a phrase that the parties are asking the Court to
4 construe. "Patron" is a critical term in the patent, and
5 "patron database."

6 The second group of terms is the software tool terms.
7 These are software tools provided to the artist or account
8 manager to do certain things in various claims, so software
9 tools to manage at least one project, software tools to manage
10 communications through the patron database, software tools to
11 design an artist-specific web page, and software tools to
12 present at least one project.

13 Crowd funding is an old concept. There is a great
14 example of crowd funding not far from the courthouse. That is
15 the Statue of Liberty. The French people gave the United
16 States the statue, but the United States had to pay for the
17 pedestal. To do that, the government didn't have money, so a
18 crowd funding system was used to generate money for the
19 pedestal.

20 This is Joseph Pulitzer. He ran these advertisements
21 or notices in his newspapers. Basically, he said if you give a
22 dollar, you will get a replica; if you give \$5, you get a
23 bigger replica. Through this campaign they raised the \$300,000
24 or so that was required to build the pedestal.

25 Legal principles. They are not really in dispute, but

1 the parties take a different view of them. The purpose of the
2 claim construction hearing is for the Court to define the
3 disputed claim terms and to give meaning to the claim language
4 so that the jury will have something to work with, something
5 that they understand. The construction is done as a matter of
6 law. In the construction, the Court looks through the lens of
7 the hypothetical person of ordinary skill in the art to
8 interpret the claim.

9 THE COURT: You have a dispute about that, don't you?

10 MR. BICKHAM: Yes, your Honor, we do. We provided a
11 definition of a person of ordinary skill in the art in our
12 opening brief. Defendants did not; we are not sure why,
13 because that is the framework that you need to look at the
14 claims. Then, in the response brief they submit a definition
15 of somebody skilled in the art as being self-taught computer
16 programmer with some understanding of the music industry.

17 Frankly, your Honor, this definition of person of
18 ordinary skill doesn't make much sense and, it's also so low
19 that my third-grade is almost a person of ordinary skill in the
20 art. Self-taught programming and some knowledge of the music
21 industry.

22 THE COURT: Should we ask your son to construe the
23 claims here?

24 MR. BICKHAM: I don't think so. Defendants do, but we
25 don't think so.

Also, the Phillips case says that you can't construe the claim terms in a vacuum. You have to look at the context. Here the context is really important. The evidence that the Court looks to in this case is only the intrinsic evidence. Neither side is asking the Court to look to extrinsic evidence. The intrinsic evidence is the patent prosecution history and all the prior art that is included with the prosecution history.

In this case the prosecution history is big. It's about 470 pages, and there's a lot of information in there. It's important for the Court to consider that information when construing the claims.

The file history is so large in part because there was a lot of interaction back and forth between the inventor and the Patent Office. The patent was filed in March of 2003. It sat around for a while before the Patent Office made a response. Then there were six amendments, there were four interviews with the examiner. There's a lot of information in there.

Another significant thing about this time line is we see from the prosecution history the specification that was filed with the Patent Office is static. It doesn't change. The claims change. Over this time it's clear that the things that are claimed in the patent are the Artistshare system. It is the system that is being used and worked in the public that

1 is being claimed. There are repeated references to the special
2 features of the Artistshare system overcoming the prior art.

3 An example of how the patent changed originally, there
4 was claim 15 that was submitted with the specification. Claim
5 1 of the patent as issued, the main claim, is quite a bit
6 different. It has terms that are not defined in the patent.
7 They don't appear in the specification other than the claims.
8 For example, the software tools don't appear in the
9 specification, your Honor, they just appear in the claims.

10 You're going to hear several themes from the parties
11 today, including that the words in the claims are carefully
12 worded and they were put there purposely and they need to be
13 given their proper weight in view of the context of the claims,
14 the specification, and the prosecution history. Some of the
15 terms are ambiguous, and the Court needs to look at how a
16 person reading the intrinsic evidence would interpret these
17 claims.

18 We believe that the defendants have taken a selective
19 construction to arrive at their proposed constructions. They
20 look at the terms in isolation, not in the context claims.
21 When the prosecution history and the statements that were made
22 to the Patent Office are considered, it's only the Kickstarter
23 proposed construction that gives any basis for the disputed
24 claim terms or for many of the disputed claim terms.

25 With that, your Honor, we're going to start with the

1 nonsoftware tool claim terms. Mr. Allan will address the first
2 three.

3 THE COURT: All right.

4 MR. ALLAN: Good morning, your Honor. We'll start
5 with "fan." This is the first term we will construe today.
6 This is a term that the defendants would like construed. Here
7 is the basic construction. Our construction is "a consumer
8 admirer, follower, mentor, or any other individual interested
9 in the artist's work." That comes directly from the
10 specification through the definition of this term in the
11 patent. The defendants want to limit this to "any individual."

12 So, as a basic matter in tentative claim construction
13 law, where the term is specifically and clear defined, that is
14 the construction your Honor should use. Here it is in fact
15 plainly defined in the specification. Moreover, our definition
16 makes common sense, where the other side's doesn't. I'll get
17 to that in a moment.

18 Here is the language from the specification. It's
19 taken directly from there. "A fan may be, but is not limited
20 to, a consumer, admirer or follower, mentor, and any other
21 individuals interested in the artist's work."

22 What the defendants have a problem with is this "may
23 be, but is not limited to" language. They argue essentially
24 that that allows them to take everything out of the definition,
25 including this critical piece, "interested in the artist's

1 work."

2 The fact that somebody is interested in the artist's
3 work is the common denominator to the definition of "fan." The
4 fact that a fan may be a consumer, admirer, or anybody else, a
5 judge, a clerk, a lawyer, a garbage truck driver, clerk,
6 whoever, those people all have to be interested in the artist's
7 work. That is the common denominator. That is in our
8 definition, it is not in theirs.

9 Although, they do admit in their brief, and this comes
10 from their brief, that that is the definition, "any other
11 individual interested in the artist's work." So the critical
12 language from the term that they take out they admit in their
13 brief should be there.

14 Why are they wrong? Their construction makes no
15 sense. I'll give you an example. A fan, your Honor, is
16 somebody that likes something. It's not just anybody.
17 Opposing counsel is from Boston. We are going to have a lot of
18 disagreements today. This is one thing I think we will
19 possibly agree on.

20 People that like the Yankees don't like the Red Sox,
21 people that like the Red Sox don't like the Yankees. Under
22 their definition of "any individual," a Yankee fan is also a
23 Red Sox fan. That just doesn't make any sense on a number of
24 different levels. So from a common sense perspective, their
25 construction doesn't make sense. It also completely ignores

1 the definition that is included in the patent.

2 By limiting "fan" to any individual as opposed to any
3 individual who has shown an interest in an artist's work --

4 THE COURT: You say any individual limited.

5 MR. ALLAN: Let's go back to the term. It's any
6 individual interest in the artist's work. If I said "limited,"
7 I misspoke.

8 THE COURT: "Any individual" doesn't have any
9 limitation. In the construction you're seeking, you do have a
10 limitation. The limitation is "interested."

11 MR. ALLAN: Sure.

12 THE COURT: You say any individual, that's the
13 limitation. But "any individual," the way I read it and common
14 sense terminology, "any individual" is not limited, it's any
15 individual. It's broad.

16 MR. ALLAN: Right. But we are not talking about any
17 individual, we are talking about a fan. The individual has to
18 have an interest in somebody to be a fan. If you're not a fan
19 of the Jets, then you're still any individual but you're not
20 interested in the Jets. That's the distinction.

21 THE COURT: For your definitional purposes, then, a
22 fan is someone who is interested?

23 MR. ALLAN: Any individual interested in the artist's
24 work.

25 THE COURT: The operative term, the critical term for

1 you is "interested"?

2 MR. ALLAN: The critical phrase are these words: "Any
3 individual interested in the artist's work." These are
4 examples that are provided directly out of spec, "the consumer,
5 admirer, follower, mentor, and any other individual interest in
6 the artist's work." But the interested in the artist's work
7 has to apply to anybody, any individual; otherwise, they are
8 not a fan, by their own definition and by common sense.

9 THE COURT: All right.

10 MR. ALLAN: One point I do want to make, your Honor,
11 is that they make the point in the briefing that the patent
12 examiner confirmed that "fan" is broadly encompassed by "any
13 individual." The patent examiner did not make that
14 confirmation.

15 The cite to the record is actually a citation to their
16 own response to an office action where they state, "Applicant
17 agrees that 'fan', as used and described in the spec, is a
18 broad term, as it encompasses any individual." That is their
19 own self-serving statement. That is not a reference to
20 anything that the examiner cites, and there is indeed nothing
21 in the record to suggest that the examiner veers from the
22 definition that is contained in the patent.

23 In summation here on this term, Kickstarter's
24 construction is based on the very clear definition contained in
25 the specification, including the common denominator we

mentioned, it is also based on common sense, and we think it will help the jury.

Next term up is "client," your Honor. Kickstarter proposes to define "client" as "a computer terminal or device used by a fan that receives offer data from the server." The defendants propose to define it as "a device capable of communicating across a network."

One of the tenets of claim construction that Mr. Bickham mentioned and that I don't think there is any dispute on in terms of the law is you've got to read the claim term that is at issue in the context of the claim. "Client" as a term that we would like the Court to construe is only in claim 1 of the patent. I have highlighted here the section that references "client" because the context of the term is really critical to the proper construction here.

With respect to "client" in claim 1, it is very clear that the client that is referenced is the client of the fan, transmitting offer data from a server to a client via a network; receiving at the client, the fan's client, the fan's computer, the fan's device, such offer data and presenting the offer to the fan; transmitting the acceptance data back to the server from the client, from the fan's client; accepting the offer.

Artistshare's construction is based on the specification. They reference the overall system portion of

1 the specification, which speaks to a variety of different types
2 of clients, not necessarily all within the embodiment that is
3 covered by these claims.

4 THE COURT: I can't read this. That is in reference
5 to what column?

6 MR. ALLAN: This is column 8, your Honor, lines 38 to
7 45. And there are references to the client computer of an
8 investor, client computer of a fan, client computer of a retail
9 establishment, an industry professional, and a manufacturer.

10 The thing is, your Honor, that in the context of the
11 claim -- again, we are only talking about claim 1 that this
12 term is at issue -- the only client that is referenced in these
13 examples that has any reference to that claim in context is
14 that of the fan.

15 Here is an example of why that is. What we did here,
16 your Honor, is we took the language from claim 1 and we plugged
17 in one of the other claim examples that the defendant are
18 relying on for their construction. It absolutely makes no
19 sense in context. "Transmitting offer data from a server to a
20 manufacturer client via network, the offer data comprising an
21 offer to fans" -- right off the bat it is not making sense,
22 because the manufacturer is not providing any offer to fans --
23 "concerning at least one project wherein the offer is for a
24 sales container at a predetermined level of patronage in
25 exchange for funds."

1 Then "receiving at" -- in context it should be the
2 client of the fan, but here we are plugging in the client of a
3 computer manufacturer -- "such offer data and presenting the
4 offer to the fan." Again, it makes to sense to have these
5 examples in. Finally, "transmitting the acceptance data back
6 to the server from the manufacturer" makes no sense. It's the
7 fan. That's the way you need to look at this in context.

8 So, that is what we have done. We read the claim in
9 context. The entity that receives the offer to the fan in
10 claim 1 is the fan. We contend, your Honor, that defendants'
11 construction ignores the context of the claim, which is not
12 what you are to do under the well-settled and black letter
13 claim construction law. By focusing the scope of this
14 construction to the term in context, you will add some clarity
15 for the jury.

16 THE COURT: Let me ask you a question. Is "client"
17 defined anywhere in the lexicon of computers? Isn't there a
18 standard definition for "client" independent of this patent,
19 independent of the claims and specifications? Isn't there a
20 standard definition for "client"?

21 MR. ALLAN: There may be, your Honor. We don't have
22 that evidence in front of us today. We would be happy to
23 submit something if you like. Do think, though, that
24 "client" --

25 THE COURT: I have a reference here, what is a client,

1 a word definition from The Computer Dictionary. It says, "an
2 application that runs on a personal computer or work station
3 that relies on the server to perform some operations." That is
4 what a client is.

5 MR. ALLAN: That's a program, your Honor. What we are
6 talking about here is a device. The patent talks about a
7 BlackBerry or an iPhone or some sort of a computer or device,
8 not necessarily an application program. So there is a bit of a
9 distinction based on how the inventor used the term "client"
10 here.

11 THE COURT: You contend what? How did he use it here?

12 MR. ALLAN: Let's go back to the proposed definition.
13 In the beginning it's sort of the same, "a computer terminal or
14 a device." They say "a device"; it's not necessarily an
15 application program. When I think of "client" in terms of
16 general computer parlance, I think of Microsoft Outlook is a
17 client that I use email on or Lotus Notes is a notes-based
18 application program client. What the patent speaks to is the
19 device.

20 If you look at the terms, it's the device that the fan
21 is receiving the offer data on. It's not a program. It's a
22 terminal, a computer or device of some sort, at least how it is
23 used in this particular patent.

24 THE COURT: All right.

25 MR. ALLAN: Next up, your Honor, is "entitlement,

1 including at least one of a product, a service, and a
2 patronage." Before I get into this much further, I think it is
3 important for your Honor to note that we are not asking the
4 Court to construe the term "entitlement." We are asking the
5 Court to construe this particular phrase.

6 THE COURT: You say this is conjunctive?

7 MR. ALLAN: That's right. We think this is just plain
8 meaning.

9 THE COURT: The defendants say it is disjunctive?

10 MR. BICKHAM: That's right.

11 MR. ALLAN: That's right. In our view, "and" means
12 and. If they had meant to say "or," then they should have said
13 "or" in the patent, in the prosecution history. But they did
14 not do that, your Honor.

15 This is, in our view, a situation where it is simply
16 plain English grammar. If you say something includes at least
17 one of an A, a B, and a C, it has to have at least one of an A,
18 a B, and a C. You can't then say or A or B or C. To do so
19 would change the scope of what they claimed in terms of the
20 patent.

21 They claim that it is internally inconsistent, your
22 Honor. I would submit to you that it is not at all internally
23 inconsistent. I can give another sort of example. If you
24 think of Thanksgiving dinner including at least one of a
25 turkey, a pumpkin pie, and mashed potatoes, the Thanksgiving

dinner has to include all three of those elements. If you have just a pumpkin pie, it is not a Thanksgiving dinner. It is exactly the same situation here.

You obviously picked up, your Honor, on the issue. There is nothing inconsistent here. They cite to some references in the prosecution history, your Honor, to try to argue that they meant "or" when they instead said "and," but there is absolutely nothing in the prosecution history that rebuts the presumption that the plain and unambiguous plain meaning of the term should apply.

they make references to the fact that "entitlement" is used singularly as opposed to plurally sometimes in the prosecution history and the specification. That does absolutely nothing to change the scope of the term we are talking about. "Entitlement," that word is in a number of spots throughout the patent. What we are asking is a construction on this particular claim.

There is also a reference in their papers, your Honor, that I think it is claim 32, which is a dependent claim, requires that the components of an entitlement be digitized. There is nothing to suggest that the components to an entitlement in this context can't be digitized, and they have submitted nothing to suggest that's the case.

I think importantly here, your Honor, we are heavily supported by Federal Circuit and Southern District of New York

1 case law. I've got copies of the Superguide case and the
2 Touhtunes case if your Honor is interested in reviewing them.

3 I thought to give you some context, this is the claim
4 term that the Federal Circuit construed in the Superguide case,
5 and it is basically identical, the same component and set-up
6 that we are asking you to do right now: At least one of
7 program start time, program end time, program service, and
8 program type.

9 The patentee in that case wanted "and" to be "or."
10 The Federal Circuit disagreed. With basically pure grammar,
11 you can read the phrasing right from the court's ruling. What
12 the Court did was they broke out Strunk and White Elements of
13 Style and they figured out if you have a series of categories,
14 when you use "and," it's a conjunctive list.

15 (Continued on next page)

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1 Touchtunes, Judge Sweet's case, dealt with the same
2 issue, just a couple of years ago. And again, I've included
3 the claim term that was at issue there and exactly what Judge
4 Sweet stated: "At least one of" and "is conjunctive."
5 Requires at least one of each category.

6 Now, you may hear my opposing counsel mention a couple
7 of cases to try to distinguish Superguide and Touchtunes.
8 There is no case that we're aware of, your Honor, and I don't
9 think there's a case that you will hear about today, that
10 required a complete deviation from the plain language of the
11 rules. Reading everything in the conjunctive literally made no
12 sense.

13 There's a case I'm aware of, I think it's an earlier
14 Southern District case, the Joao case in which there were four
15 or five elements related to a bank transaction. The claim
16 clearly called for only one piece of the transaction. Yet, the
17 conjunctive elements all required them to be there, and it
18 literally made no sense, and the judge in that case said
19 because of that, I can't construe it in the conjunctive. And I
20 think there may be another case like that. But you won't find
21 any case, your Honor, I don't think, at least that we're aware
22 of, that deviates from the plain meaning unless there is some
23 scenario in which it makes no sense at all.

24 THE COURT: Is that the Sleepy Hollow Bank case you're
25 talking about?

1 MR. ALLAN: Yes, your Honor, it is.

2 In that case also, the Sleepy Hollow case, there was
3 also a figure in the patent that listed the elements of the
4 proposed claim term in the disjunctive, so there were a number
5 of factors in that case that led the judge in that case to
6 deviate from the ordinary meaning. None of those factors is
7 present here.

8 THE COURT: Very well.

9 MR. ALLAN: Thank you, your Honor.

10 THE COURT: Patron.

11 MR. BICKHAM: Yes, your Honor.

12 Patron is a key term in the patent, and it appears in
13 actually most of the claims that are being asserted, and this
14 is a claim where it's particularly important to look at the
15 claim in its context. The proposed constructions are,
16 Kickstarter says, "a fan who registers with an artist and who
17 provides a contribution to a project of an artist in exchange
18 for certain entitlements."

19 ArtistShare says patron is "one or more individuals
20 who contribute to one or more projects" or "is registered to do
21 so." So the question for the Court is really what definition
22 of patron does the claim refer to. There are two types of
23 patron in the patent that are described in the specification.
24 There are patrons who register with the ArtistShare system;
25 those are essentially members. And there are also patrons who

are patrons of a specific artist. And the language here comes from the specification, one for patron upon registration, one for patron of the artist.

In the context of the claims, it's Kickstarter's construction that makes sense. The claim language speaks about a patron in terms of interacting with an artist. And, your Honor, there's only one patron that the jury should be instructed about in connection with the claims, as opposed to the specification. The claims require Kickstarter's construction.

Now, this is a dense concept looking at the specification and the claims. So here is an illustration. How does Joe Public become Joe Patron? He starts becomes interested in the artist's work. That makes him a fan.

Step two, register with ArtistShare.com. That makes him a patron, patron member of the system, and that's where ArtistShare or defendants would have the Court stop. That's the threshold or baseline. But under our definition, and supported by the specification, there needs to be registration with an artist and a contribution made to a project. Then Joe Public is Joe Patron of an artist. So Kickstarter's construction comes directly out of the specification, and this language in the specification also supports the fact that there is a member type of patron, somebody who becomes a patron merely by registering with the system.

1 THE COURT: Let me ask you a question with respect to
2 fan. You define fan as set forth in the '887 patent at column
3 six, line 61, correct? That's the definition. Why don't you
4 accept the definition that's set forth in line 64 from patron?
5 You skip forward, further into the patent specifications.

6 MR. BICKHAM: Yes, sir.

7 THE COURT: Why isn't this definition a good one? If
8 fan is defined properly in the patent, why isn't patron defined
9 properly?

10 MR. BICKHAM: A couple of reasons.

11 THE COURT: Yes.

12 MR. BICKHAM: First of all, the key is not what is the
13 proper definition in the patent; it's what the proper
14 definition of patron in the claims is. And this is the wording
15 in the patent, "the patron may be but is not limited to a fan,"
16 and then in parentheses, "has a consumer, admirer, follower,"
17 what Mr. Allan was just speaking to, "that registers with
18 ArtistShare and/or," so that's the member patron, by
19 registration. "And/or contributes to or purchases an artist's
20 project, work, or the actual artist." So that's the patron of
21 the artist. This is a two-part definition, and it actually
22 doesn't make sense because you can't purchase an artist.

23 Kickstarter's definition makes sense in view of the
24 claims. So, for example, if your Honor looks at claim 36 in
25 the patent.

1 THE COURT: All right. 36, system for marketing, and
2 so forth?

3 MR. BICKHAM: Yes, sir, or even at the top of that
4 page, 35, in claim 35.

5 THE COURT: Okay.

6 MR. BICKHAM: So these claims all require something
7 beyond mere registration. They require an affirmative act of
8 the fan to accept the offer from the artist and then they're a
9 patron. These claims don't talk about just registration and
10 stop. They talk about the patron who accepts the fan's or the
11 artist's offer. In 35, at the bottom of 35, this is column 24,
12 so the offer is transmitted to the fan or the patron, and then
13 the claim continues at the top of column 25, receiving
14 acceptance of patronage from the patron.

15 So now, so there's a difference between fan or patron,
16 that until they receive and accept that offer, they're not a
17 patron.

18 THE COURT: They're not patrons. Is that what your
19 point is?

20 MR. BICKHAM: Yes, sir.

21 THE COURT: They're not patrons until they've --

22 MR. BICKHAM: Yes, sir.

23 That's also illustrated in column 36, at the top,
24 registering the fan as a patron. This is once they accept the
25 offer. Then there's registration of the fan as a patron in a

patron database. So here again, the fan becomes a patron after they accept an offer, and we could have done slides for each of the independent claims here, but the concept is the same. The claims talk about one of the types of patron, and they don't refer to both kinds of patron that are in the definition and specification. And it's how the claim terms are used in the claims that the Court needs to construe.

THE COURT: All right.

MR. BICKHAM: Another problem with ArtistShare's construction is this. It defies common sense, really. Members are also described in the patent and the specification as people who register with the system. So registrants of the system are patrons and members, and the term is used somewhat interchangeably, and it's confusing. But under ArtistShare's construction, a patron can either be a member or someone who actually contributes to the project. This runs counter to the common sense of patron.

For example, I can enroll with Amazon.com. I can register with them, but that doesn't make me a patron in the normal sense of a patron, not until I make a contribution. Or the Kennedy Center, I can enroll with them and become a member, but until I give them something, that's not the common definition of patron. And so we submit that ArtistShare's generic definition is divorced from the claim language, which is the focus.

1 The next term follows on to patron database.
2 Kickstarter proposes this to be an artist-specific database
3 that contains certain information, contact, sales, and
4 demographic information, of his or her patrons gathered from
5 the artist's projects. So this is information gathered from
6 the patron after the patron has accepted an offer. ArtistShare
7 uses a very broad definition, "a database containing
8 information relating to one or more patrons." Now, that uses
9 the patron/member definition of patron.

10 So Kickstarter's approach to interpreting this claim,
11 we started with the claim. Which patron is being referred to?
12 We went to the prosecution history. Patron database is not in
13 the specification. Patron database is not in the
14 specification. So we went to the prosecution history. There
15 are a number of statements in the prosecution history, that the
16 system, which is the invention, is artist specific. And this
17 is an example of where patron database comes up in the claims.
18 And so the patron database is the database of patrons that
19 contains the sales and marketing information.

20 I mentioned that the prosecution history is important,
21 and so this is the prosecution history. September 2010, that's
22 seven years after the specification was filed with the patent
23 office, Mr. Camelio, the inventor, said that the patron
24 database is specific to a particular artist. Those are the
25 words in his response to the office action, and the page

1 number, 437, refers to the prosecution history that we
2 submitted in my declaration.

3 THE COURT: That's Exhibit 2, Bates No. 437?

4 MR. BICKHAM: Yes. And he distinguishes the prior art
5 based on this artist-specific system.

6 Then this is consistent with the specification that
7 says that the artist may control her database. She may share,
8 sell, license, her database to other artists or third parties.

9 If this were not a patron-specific database, the
10 reference would be saying that one artist can sell, license, or
11 share patron information of other artists. It only makes sense
12 that an artist can share, sell, or license information from
13 their own patrons, and that's where we come with the
14 artist-specific part of the definition.

15 The patron database contains more than just
16 demographic information or contact information. And the
17 prosecution history talks about that. It's the functionalized
18 database where the artist may access the precise data on the
19 patron's demographics and sales patterns. Now, demographics
20 and sales patterns do not come from a registration. That
21 doesn't come from patron/member patron. That comes from
22 patrons of an artist patron.

23 There's also another place in the prosecution history,
24 we don't have a slide for it, but page 363 of the prosecution
25 history talks about the system transforming routine data into

1 the valuable ports and functionalized database wherein the
2 artist may access precise data on a patron's demographics. We
3 didn't just come up with demographics out of the air. That's
4 363 of the prosecution history, first full paragraph, lines
5 three and four.

6 THE COURT: The system transforms routine data into
7 the valuable ports, is that what you're referring to?

8 MR. BICKHAM: Yes, your Honor.

9 THE COURT: That's page 363; in other words, page
10 seven of the reply to office action?

11 MR. BICKHAM: Yes, your Honor.

12 So this is more than just mere registration that we're
13 talking about. That's it for the nonsoftware tools.

14 THE COURT: All right. Why don't we hear from
15 Mr. Smith on the nonsoftware tools.

16 MR. SMITH: Thank you, your Honor.

17 THE COURT: That's fan, client, patron database, and
18 the entitlement about that, piece one prong.

19 MR. SMITH: Let me make sure I've got this straight.
20 Fan, patron, patron database.

21 THE COURT: He went into the order of fan, client,
22 entitlement for at least one project, patron, and patron
23 database.

24 MR. SMITH: Your Honor, if you would, I have some
25 paper copies of ours, to make it easier.

1 THE COURT: Thank you. Go ahead.

2 MR. SMITH: Thank you, your Honor.

3 For our presentation, we had some initial slides from
4 the beginning that give sort of an overview of some of the
5 issues that were in play relating to funding projects. I
6 wasn't sure if you were interested in getting some of that
7 background or if you want me to dive right into the claims.

8 THE COURT: If you think it's helpful for me to have
9 the background, go ahead.

10 MR. SMITH: I'll do it quickly to sort of frame some
11 of the arguments that are going to come up today.

12 One of the things that artists could do prior to the
13 inventions that are disclosed in the '887 patent, many artists,
14 especially if you're in the music industry, you have a
15 situation where the only way to really get yourself recognized
16 and get funding for whatever you wanted to do is to have some
17 sort of a contract with a recording company. And so there was
18 this difficulty about how do you get money in order to be able
19 to fund any of your projects. And sort of a little bit of an
20 illustration that I'll show on slide three of our slide deck,
21 where what it's really showing is the notion of an artist who
22 has to give up a lot in order to get a little.

23 The artist has to give up their rights to the work.
24 They have to give their creative work to the production
25 company. The production company then takes over and they do

1 the marketing. They do the sales of it. Then the artist is
2 the one that gets a little bit of money back from the
3 production company. This model has been in place for many
4 years, and many artists felt like it just doesn't work for
5 them. Unless you're a very well-known big artist, you never
6 get recognized. You never get any money for any of the work
7 that you want to do, even if you're fortunate enough to get a
8 contract with one of these production companies. And the
9 patent goes into some detail describing some of the problems
10 that artists had when they were trying to get funding and how
11 difficult it was.

12 So, there was a need for a better solution to this
13 problem, and the patent, the '887 patent, describes solutions
14 for this problem. So instead of having this model where you
15 have to really sort of get a production company or some other
16 company to fund you to get you moving, here is a model where
17 you could get others to fund your projects, even before they
18 were created, and allow you to then use those funds to put
19 forward your project. Some of the benefits are it allowed the
20 artists to be able to have the money ahead of time and be able
21 to fund their projects and bring them to fruition, whereas in
22 the past that might never have happened.

23 The concepts behind the inventions are disclosed here.
24 It's sort of helpful to understand it from the concept of
25 what's going on. These system claims in the patent are talking

1 about this notion of you have this system that is going to
2 allow artists to come in and create a description of what their
3 project is, be able to market it, and then allow that to go out
4 to people so that other people could see it. Anybody could see
5 it. It could be on the Internet, on any Web page, where you
6 would be able to see what these artists are doing, what they're
7 up to, and then be able to use that to create interest in what
8 you're working on and get people to then fund you as a result
9 of it.

10 There are several different aspects of the invention
11 described in the specific figures of the patent. You heard a
12 little bit of Kickstarter's suggesting that there is no
13 disclosure of what kind of tools that the artist could use for
14 purposes of managing their project or presenting their project,
15 when, in fact, if you look through the patent, there are
16 something like 60 figures which go into detail about what each
17 of these aspects could look like in terms of what the artist
18 could use in terms of managing a project, presenting a project.

19 Also, one of the lead aspects of the particular seven
20 inventions that are disclosed in the patent is this idea that
21 you give people something in return for committing to funding
22 your project. It could be a product, it could be a service, it
23 could be a patronage. The patent calls those entitlements.

24 Finally, the inventions also allow communications with
25 the people who are either looking at different projects, they

1 might be interested in them, they might not be, and people who
2 decide they want to fund the project and then go forward and
3 actually commit to funding. It allows communications with all
4 those people.

5 I think you have already heard a little bit about the
6 claim construction law, so I'm not going to belabor the point.
7 I do think there are a couple of key points worth emphasizing
8 for purposes of our conversation.

9 The first is although there are claim terms that both
10 sides say are in dispute, it's up to the Court to decide
11 whether or not every term actually needs to be construed.
12 There are times when claim terms on their face are easily
13 understood, and I think we've got a number of them here where
14 the Court can decide whether or not it actually has to be
15 construed after other terms are already construed.

16 THE COURT: You say there are only two terms that have
17 to be construed?

18 MR. SMITH: That's correct, your Honor.

19 THE COURT: And those two terms are?

20 MR. SMITH: Fans and patrons.

21 I think the most critical aspect of the claim
22 construction law comes out of the Federal Circuit's Phillips
23 case, the en banc decision in Phillips. It goes through in a
24 lot of detail how the Court should proceed and look at claim
25 construction. The most important element that comes out of

1 that case is the notion that the claims are going to be given
2 their ordinary and customary meaning. That's the meaning that
3 should control the claims, and although there are some limited
4 exceptions to it, that's what the Court should be focusing on,
5 what is the plain and ordinary meaning.

6 The two exceptions that the courts have been willing
7 to say we're going to deviate from the plain and ordinary
8 meaning --

9 THE COURT: Where the patent actually discloses, this
10 is the normal meaning, here's the meaning for this one, and he
11 defines it.

12 The second one is, what, estoppel?

13 MR. SMITH: That's where if you disavow the full claim
14 scope by something you say in your specification or prosecution
15 history, and there it has to be clear and unmistakable, and
16 ambiguities as to whether or not there was any disavowal don't
17 count.

18 THE COURT: The way I read the papers, both sides
19 agree on what the legal definitions are.

20 MR. SMITH: I think that's right, your Honor. I think
21 there is an emphasis that changes if you read through their
22 briefing. A lot of what they say is you should read these
23 limitations into the claims, but that's all the exception to
24 the rule, and I think framing it to make sure it's clear, the
25 rule is you should be entitled to the full scope of your

1 claims.

2 The exception is what they're arguing for their claim
3 construction. They're saying it's the exception to the rule
4 that always applies, that in every one of their instances, you
5 should take something from either the specification or the
6 prosecution history and incorporate it into the claim language,
7 even though that claim language doesn't have that limitation
8 there.

9 Courts have also emphasized the notion that you
10 shouldn't read limitations into the claims. That's not the
11 purpose of the specification, to be taking things and
12 incorporating them into the claims. It's the claims that
13 define the invention, not the specification. Again,
14 prosecution disclaimer has to be clear. It can't be ambiguous.

15 I was going to jump right into starting with fans.

16 THE COURT: Why don't you. I'm ready to hear what you
17 have to say.

18 MR. SMITH: Right.

19 As you've heard, there's a dispute as to what fans
20 means. Our definition of fans means it's any individual.
21 Kickstarter's definition is much narrower than our definition.
22 Their definition requires that it can be several different
23 types of people, but as you clued into in your questioning of
24 Kickstarter's counsel, their key limitation is the notion that
25 every one of those individuals has to be interested in the

1 artist's work. That, they say, comes from the specification,
2 meaning they say they're just taking the definition from the
3 specification, but they're not really because the definition in
4 the specification, as we put up on this slide, specifically
5 says "a fan may be but is not limited to a consumer, admirer,
6 or follower, mentor, and any other individuals interested in
7 the artist's work."

8 THE COURT: Let me ask you a question. I know nothing
9 about this. I'm a complete innocent when we're dealing with
10 project funding. Am I a fan?

11 MR. SMITH: I think you could be. Sure.

12 THE COURT: No. Am I?

13 MR. SMITH: Yes.

14 THE COURT: Even though I know nothing about this? I
15 have no interest in music. I have no interest in supporting an
16 author or creative artist. I'm a fan under your definition?

17 MR. SMITH: Correct, your Honor.

18 The way they're describing fan is anyone who can come
19 in, take a look at what's going on and say am I interested or
20 not. It doesn't have to be someone who has some preconceived
21 notion of, Oh, I'm already interested in this particular artist
22 and therefore I'm a fan of it.

23 THE COURT: I'm a cheapskate. I'm not interested in
24 giving anybody anything for any kind of entitlement. There is
25 no inducement you can offer me. Am I still a fan?

1 MR. SMITH: sure. You could still go on and look.

2 THE COURT: I have no interest in doing that. I'm a
3 Luddite.

4 MR. SMITH: Under our definition, you could still be a
5 fan.

6 THE COURT: How about somebody that doesn't have a
7 computer?

8 MR. SMITH: They could be a fan, too. Would they fall
9 within everyone, would someone who doesn't do anything,
10 actually be involved?

11 THE COURT: I know there are further steps. I'm
12 talking about the first step, the definitional step.

13 MR. SMITH: Sure.

14 THE COURT: You mean any individually, using that
15 quite literally?

16 MR. SMITH: Quite literally. Any individual.

17 The patent is written to be clear that a fan can be
18 anyone. They had to pick a term that could be used to describe
19 what it is that is going to be involved in people going and
20 looking at a Web site, seeing if they're interested.

21 THE COURT: How is it Kickstarter's definition excess?
22 I know you caution against taking excess verbiage, but what
23 they want to do is use your own verbiage. How is that excess?
24 You define fan in column six, I think. That's your language.

25 MR. SMITH: That's correct. That's the language from

1 the specification.

2 What they're trying to do is to say you've defined it
3 like this, making it clear that it's broader than just what you
4 said in the spec, but not limited to, it can be other people,
5 and saying we're going to cut out but it's not limited to and
6 say it's only these people. And so our argument is you can't
7 just take words from the spec and say, Okay, now we're going to
8 say that this is the only thing a fan can be; it can only be
9 these limited people because that's what you said. In fact,
10 what we said is it's not limited to those people, but those are
11 examples of people who could be fans.

12 THE COURT: It says "consumer, admirer, follower, or
13 mentor." Those are people who are, by definition, interested.

14 MR. SMITH: Yes.

15 THE COURT: Any other individual interested, so you
16 define classes of fans who have an interest. If you're a
17 consumer, you're a fan, right?

18 MR. SMITH: You could be. You don't have to. I could
19 think of consumers going to the site and seeing a whole list of
20 potential artists. Do you have to be interested in that
21 specific artist?

22 THE COURT: In the common sense, doesn't consumer
23 indicate you've actually bought something, you've consumed
24 something? It doesn't deal with potential. It deals with
25 someone who has actually done something.

1 MR. SMITH: I don't think that consumer connotes in
2 this interpretation that the consumer has to have already
3 purchased something from a particular artist.

4 THE COURT: How about admirer or follower? That
5 indicates an affirmative act, you know something about the
6 object. You admire it, through some kind of active conscience
7 or mind act that's going on.

8 MR. SMITH: I agree with you, your Honor. I think the
9 admirer or follower is more specific than just consumer.

10 THE COURT: Mentor suggests there is some type of
11 relationship between the fan and the artist.

12 MR. SMITH: Correct. I don't think it necessarily
13 goes as far as to say a mentor has to be interested in the
14 person's work. A mentor could be just interested in helping
15 someone, but I don't think you have to be interested in the
16 artist's work in order to be a member.

17 THE COURT: They would have to be interested in
18 something.

19 MR. SMITH: Interested in helping. I like to do pro
20 bono work. I'm interested in helping, but I don't have to
21 necessarily be interested in whatever the people are doing.

22 THE COURT: Go ahead.

23 MR. SMITH: Again, we base our definition of any
24 individual based on how broadly the patentee described it. We
25 also look at specifically if you go to the specification, it

1 talks about fan very broadly as well. It talks about a fan can
2 access the ArtistShare home page and view public Web pages of
3 the artist. That sounds like any individual. You don't have
4 to be any specific type of fan to just go and look at a
5 specific Web page on a specific site. You could just be
6 someone who is just interested in music and you can go and look
7 and see, Oh, I notice that there are a number of bands who are
8 looking for funding for this particular project.

9 We also looked at the prosecution history to see how
10 does that support our particular definition of what a fan
11 should be. During the prosecution history, the patentee was
12 questioned during the examiner interview, where you're allowed
13 to go talk to the examiner about what are the examiner's
14 concerns, what are things going on that the examiner wants to
15 talk about. And one of the issues was the examiner noting that
16 the term "fan" seemed very broad. And here, the applicant is
17 specifically saying to the examiner, so that there is a clear
18 understanding during the prosecution of this patent, "the
19 applicant agrees that fan as used and described in the
20 specification is a broad term, as it encompasses any
21 individual."

22 So there was no ambiguity with respect to the examiner
23 as where the examiner understood what ArtistShare was saying a
24 fan is. It was clear they were saying a fan is any individual.

25 THE COURT: Where is that from? Can you go back one

1 slide? What page is that?

2 MR. SMITH: We just attached portions that we think
3 are relevant. This is actually Exhibit B to William Seymour's
4 declaration. It's at page eight.

5 THE COURT: Thank you.

6 MR. SMITH: You've pointed this out during some of the
7 questioning, what is it that's potentially a problem with
8 Kickstarter's definition of fans. And I think the issue is
9 like many of their interpretations, they're trying to cram
10 additional limitations into terms that don't belong there.
11 Patentees should be entitled to the full scope of what their
12 invention covers. It was clear that fan could be a much
13 broader term than the one that Kickstarter wants us to
14 interpret it to mean, and that's the reason why we believe
15 Kickstarter's construction is improper. It's just unduly
16 limiting.

17 THE COURT: You're on to patron now.

18 MR. SMITH: That's right, unless you have anything
19 further.

20 THE COURT: No, I don't.

21 MR. SMITH: Thank you.

22 Patrons we define as one or more individuals who
23 contribute to one or more projects or is registered to do so.
24 Although Kickstarter says it takes this definition from the
25 specification, it seems to take part of the definition from the

1 specification and limit other parts of what it doesn't like
2 from the specification.

3 For example, if you look at the specification, the
4 specification actually says "a patron may be, but is not
5 limited to, a fan who can be a consumer, admirer, or follower,
6 mentor," and the like, "that registers with the ArtistShare
7 and/or contributes to or purchases an artist's project, work,
8 or the actual artist."

9 THE COURT: What does "or the actual artist" mean,
10 that hanging, dangling participle?

11 MR. SMITH: I think it means that you can contribute
12 to the artist directly. You don't have to contribute to just a
13 project. A patron can be someone who contributes to the
14 artist, actual artist. It doesn't mean, as Kickstarter has
15 implied, that you're purchasing the artist. The clause is
16 "contributes to or purchases an artist's project, work, or the
17 actual artist," so the contribution may be a contribution to
18 the artist, him or herself.

19 THE COURT: Without going through your patent? Does
20 the contribution have to be through the system that's covered
21 by the patent, or could it be just outside the patent?

22 MR. SMITH: In the context of the claim, I think it's
23 clear that what we're talking about is someone who is
24 ultimately going to contribute to a particular project, but
25 that isn't a limitation meaning patrons don't have to

1 contribute in order to be patrons. And we're going to see why
2 that's just abundantly clear when we walk through the claims
3 and the specification.

4 THE COURT: Go ahead.

5 MR. SMITH: One of the first examples to show you why
6 a patron is much more than just someone who has to contribute
7 to a project, as Kickstarter suggests, again we're at slide 30
8 on our slide deck, here it's showing a schematic of someone who
9 can have a patron account or patron information in it. But
10 there's no requirement that there's any sort of contribution
11 that has to take place in order to have a patron account. And
12 so a patron can certainly be somebody who hasn't done any
13 contributing but is just simply registered with the fan-funding
14 site. And that's clarified even in the specification where we
15 cite to the specific language on column 17, lines 45 through
16 47, which say, "upon registration with ArtistShare, the fan
17 (now a patron) may then access a member area," which just
18 generally includes more features and content.

19 So the clear implication is that registration alone is
20 enough to become a patron. There's no requirement, as
21 Kickstarter suggests, that you have to both register and
22 contribute in order to be a patron.

23 THE COURT: What's the difference? If you're a fan
24 and you register, you're still a fan, right? Upon
25 registration, you become a patron.

1 MR. SMITH: That's exactly right, your Honor. Once
2 you register, you become a patron.

3 THE COURT: How does the system recognize that you're
4 a fan?

5 MR. SMITH: Any individual who is looking at the site
6 is considered a fan.

7 THE COURT: What does the fan have to do to move from
8 her status or his status as a fan?

9 MR. SMITH: You have to either register with the
10 system or you have to contribute to a particular project.

11 THE COURT: How do you contribute without registering?

12 MR. SMITH: Most likely, you have to register to
13 contribute, but there could be a situation where you could just
14 contribute. There may not have to be a registration in order
15 to contribute.

16 THE COURT: All right. Go ahead.

17 MR. SMITH: But, clearly, specification claims do not
18 require that those two steps have to occur in order for it to
19 go forward. It could be anonymous contributions, as one
20 example.

21 During prosecution, we're looking for how do the
22 claims specification and the prosecution history line up; do
23 they make sense together as a whole. And here again, during
24 prosecution, it's clear that patron is broader than having to
25 just contribute. Specifically, in Exhibit B, which is part of

1 the prosecution history to the '887 patent, the May 5, 2010,
2 portion of the prosecution history talks about, for instance, a
3 patron is defined, for example, in paragraph 168 as a fan who
4 has registered with ArtistShare. Again, registration is enough
5 to become a patron. There's not a next step that you have to
6 contribute, although a patron could certainly contribute.

7 During Kickstarter's argument, they pointed to a
8 couple of things that they say support their position, but I'll
9 argue, your Honor, that actually they don't; they support our
10 position. Counsel for Kickstarter pointed you to claims 35 and
11 36 of the patent. I'd like to see if we can just pull that up
12 for you.

13 So here we are. I'm showing 35 on the screen. And
14 what they pointed to and suggested that, Well, a patron has to
15 be someone who's contributed because they look down on -- this
16 is now claim 35, which starts on column 24, at about line 53,
17 and then continues on to column 25, ending about line four.

18 THE COURT: Right.

19 MR. SMITH: And they indicated that because, if you
20 look at the end of the claim, where it says that "receiving
21 acceptance data for an entitlement at a predetermined level of
22 patronage from the patron," they're suggesting that that's the
23 point at which you become a patron, but that wouldn't make any
24 sense in light of the language which precedes it, which says,
25 "transmitting offer data to said fans and/or patrons." The

1 patron here could clearly be someone who hasn't yet contributed
2 to this particular artist. So the preceding step, I would say,
3 argues against Kickstarter's construction which clearly shows
4 that you're transmitting offer data to fans or patrons, and
5 it's not indicated that that person has done anything to
6 actually contribute to a project.

7 THE COURT: Which person do you make reference to, the
8 fan or the patron?

9 MR. SMITH: It says, "transmitting offer data to said
10 fans and/or patrons." So I'm looking at column 24, line 65.
11 This is the claim element that just precedes the portion that
12 Kickstarter's counsel was referring to.

13 THE COURT: Okay.

14 MR. SMITH: So looking at Kickstarter's construction,
15 the problem we have with it is they're trying to take a term
16 that we think is pretty easy to construe and add limitations
17 into it to make it narrower than either the specification or
18 the prosecution history ever intended and, I submit, even the
19 claims as they're written and Kickstarter pointed to would ever
20 be because now they're saying that patron has to have two
21 elements, these two specific elements. They have to both
22 register and contribute, and then they add an additional
23 element in exchange for certain entitlement, again, additional
24 verbiage which we don't think is supported by just the term
25 "patron."

1 THE COURT: And in your definition, you become a
2 patron by registering or contributing, either one?

3 MR. SMITH: Correct, your Honor. It could be both,
4 but you just need one to become a patron. You don't need both
5 of them.

6 THE COURT: If you don't have to do both, you could do
7 one or the other, what distinguishes the patron from the fan
8 with regard to registration?

9 MR. SMITH: Registering means that you're actually
10 telling the system that you want to be part of the system. So
11 you want to be able to --

12 THE COURT: But you're a fan before that, aren't you?

13 MR. SMITH: Correct. Before you become a patron.

14 THE COURT: And on registration, are you always a
15 patron then? You've lost your status, your status is no longer
16 that of fan; you're a patron?

17 MR. SMITH: After you've register, yes. I'd submit
18 that you have now moved from a fan to a patron because once
19 you've registered with the system, the patron gets entered into
20 a database, and that would be a point where I've narrowed it,
21 where now a fan is no longer just any individual, now you've
22 registered with the system, now you are actually a patron.

23 THE COURT: All right. Do you want to say a few words
24 about the remaining three nonsoftware tools?

25 MR. SMITH: Yes, your Honor. Do you want to talk

1 about patron database?

2 THE COURT: Yes.

3 MR. SMITH: Patron database I don't think actually
4 needs to be construed simply because we've already described
5 what a patron is. I think the Court will define for us what it
6 believes a patron is, and patron database doesn't need to be
7 independently construed because neither party is asking the
8 Court to construe what the term "database" means. So we submit
9 that once you've construed patron, patron database will
10 actually be already construed. But if the Court sort of
11 decides that it wants to construe patron database, then we
12 submit patron database is a database containing information
13 relating to one or more patrons.

14 Kickstarter takes a different approach and wants to
15 incorporate a large number of additional limitations into the
16 term "patron database." They want it to be artist specific.
17 They want it to include certain specific information. And they
18 want to define how that information is gathered. So they want
19 three new limitations added into the claim for patron database.
20 None of those, in my estimation, should be added to them.

21 First off, Kickstarter wants to add a bunch of
22 information that has to be in the database. They list out
23 three different categories of information that have to be in
24 the database. That's on slide 33 where they have that. We
25 submit that the claims already talk about what has to be in the

1 database, meaning the claims themselves specifically talk about
2 registering contact and marketing information for purposes of
3 claim one. Claim 17 talks about registering contact
4 information. Claim 36 talks about registering the fan as a
5 patron in a patron database.

6 All of those claims already talk about what it is that
7 is getting put into the database. And the notion that now
8 we're going to take the term "patron database" and add
9 additional limitations that are not found anywhere in the
10 claims themselves, in my view, violates the whole view of claim
11 construction where you're not supposed to be reading
12 limitations into the claims. We're supposed to be interpreting
13 the claims, and what Kickstarter is doing is adding limitations
14 that don't exist in the claims and are actually much narrower
15 than the claims themselves actually say is what goes into the
16 database.

17 One issue that I think needs vetting, too, is we refer
18 a lot to patron database, but I think it's important, if you
19 look at claim 17 of the patent, to see specifically how this
20 database gets used in the claims. Claim 17, which is at
21 approximately column 23, I'm going to be starting at around
22 line 23, says, "allowing patrons to demonstrate interest in one
23 or more projects, prior to, during, and after the creation,"
24 and then it says, "registering contact information regarding
25 interested patrons in a searchable database."

1 So here it's talking about taking the information
2 about the particular patron and putting it in a searchable
3 database. That's all it says about how this database is
4 initially put together. It doesn't require any specific
5 limitations as to whether it's artist specific or anything
6 else. And then later in the claim term, when we get down where
7 it says "managing communication," which is about line 34, it
8 says, "managing communications through said patron database."

9 So there it's referring to the database that was
10 referenced above where you're registering contact information.
11 Here again, talking about a generic database. The patent talks
12 about databases in terms of centralized database, database for
13 the system. There is nothing in the claim that would require
14 this to be some form of specific database that only applies to
15 a specific artist. It's just a general database where patron
16 information is put into.

17 Also, this language here further confirms what we were
18 talking about earlier about patrons, where it talks about
19 allowing patrons to demonstrate interest in one or more
20 projects. Here is a patron who hasn't done anything yet; now
21 it's interested in someone's project and now it does something
22 with it.

23 THE COURT: Doesn't the patron have to indicate his
24 interest in some specific artist project though?

25 MR. SMITH: No.

1 THE COURT: No? It could just be any project, music,
2 or a book?

3 MR. SMITH: Could be any project that is available.

4 THE COURT: Piece of art?

5 MR. SMITH: Sure. There's no specific project that it
6 has to be related to.

7 The three limitations they try to add in are artist
8 specific, specific data that goes into it, and where the
9 information is gathered from. We already talked about how the
10 claims already talk about what is in the database; you
11 shouldn't be adding more information in there than what the
12 claims specifically tell us. It talks about where it believes
13 the information is gathered from. Again, the claims I just
14 read to you from one of the claims talks about simply upon the
15 interest of the patron, all of a sudden, information goes into
16 this searchable database. It doesn't say that it's gathered
17 from an artist's project. And again, the notion that they're
18 trying to limit it to an artist-specific database, in our view,
19 doesn't make sense because there's nothing about the databases
20 that are described in the claims that have to be artist
21 specific. And I'd submit that it also ignores the fact that
22 the specification specifically talks about centralized
23 databases and not just databases that are limited to a specific
24 artist.

25 During Kickstarter's discussion, they focused you on a

1 portion of the prosecution history where they were saying, Oh,
2 here's where the patentee said that it has to be specific to a
3 particular artist. What they didn't explain is the context of
4 when that statement is made. They already distinguish all the
5 prior art that the examiner had said that the examiner thought
6 was relevant to discussing their invention and thrown in
7 another reference that they said was analogous art, meaning
8 that it might be related to some fan-funding concept. And the
9 patentee said, No, this isn't really related to the systems
10 that we're talking about, and went on to explain a bunch of
11 reasons why it's not related to it. And so this isn't a
12 situation where the patentee was trying to distinguish a piece
13 of prior art based on a specific limitation, the type of
14 disclaimer that would be necessary for a court to say, Oh, yes,
15 you gave up some scope of your claim language.

16 Here, it was just the examiner had thrown a piece of
17 prior art at them and said, Oh, we think this might be
18 relevant, and the patentee is saying no, it's not even close,
19 it's not even relevant to what we're talking about, here is why
20 it's not relevant.

21 THE COURT: Do you want to say a few words about
22 clients and entitlement?

23 MR. SMITH: The client appears on slide 41. I think
24 you picked up on this during your questioning of Kickstarter.
25 A client does have definitions that refer to sort of computer

1 and applications. I think there are some standard definitions
2 of client.

3 In the patent, they use client very broadly just to
4 refer to the large number of things that you can use to
5 communicate across a network. We try to capture that
6 definition in our proposed construction where the client is
7 going to be a device capable of communicating across a network.
8 We think that's a pretty honest assessment of the specification
9 of what the patent claims describe.

10 Kickstarter again wants to add some limitations into
11 that. They want it to be something that has to be used by a
12 fan that receives offer data from the server. They want to
13 craft in a couple of extra limitations that the term "client"
14 doesn't ordinarily get and shouldn't get in these particular
15 claims.

16 THE COURT: Do you draw a distinction between computer
17 terminal and a device?

18 MR. SMITH: I think, yes, they can be different
19 things. Computer terminal could be similar to the terminal
20 that is sitting on your desk whereas a device could be a much
21 different unit. It could be anything from a mobile device --

22 THE COURT: Under your definition, as distinct from
23 Kickstarter's. They talk about a computer terminal. You only
24 talk about a device.

25 MR. SMITH: Right, because I think a device could be a

1 computer terminal.

2 THE COURT: Device is a broader term in your
3 terminology.

4 MR. SMITH: Correct, your Honor. I think our
5 definition would encompass a computer terminal.

6 THE COURT: Right.

7 MR. SMITH: So a couple of limitations that
8 Kickstarter adds in. There's nothing in there that requires
9 that it be used by a fan. We don't have to incorporate client
10 that is being used by fan. In fact, if you read the claims,
11 the claims are all system claims. It's talking about what the
12 system is providing to people who want to access the system.
13 It's not talking about what the client is actually doing.

14 THE COURT: All right.

15 MR. SMITH: The specification clearly describes the
16 client. It says, "each of the clients may communicate with the
17 host via a computer network which may comprise the Internet;
18 clients may be any wired or wireless device," and it's a very
19 broad definition because client is something that could be
20 many, many things as long as you're able to communicate with
21 it.

22 THE COURT: All right.

23 MR. SMITH: I was going to move on.

24 THE COURT: To entitlement including at least one of a
25 product or service or patronage?

1 MR. SMITH: Correct, your Honor.

2 That's on slide 53 of our slide deck. Here, the big
3 dispute is how do you interpret "including at least one of."
4 And the language of the claim is "an entitlement, including at
5 least one of a product, a service, and a patronage."

6 Kickstarter's definition reads the entire language "at
7 least one of" out of the claim. They just say an entitlement
8 is a product, a service, and a patronage. That can't be the
9 right construction because you're totally eliminating the exact
10 language that was used by the patentee to say an entitlement
11 includes --

12 THE COURT: Wait a minute. The language of the
13 patentee is the word "and." Correct?

14 MR. SMITH: Correct.

15 THE COURT: But the way you define the term, it says
16 "and." It becomes "or."

17 MR. SMITH: I think it's proper to construe, I agree
18 with you, yes, that "or" is, you can construe it to mean a
19 product or a service or a patronage. And I think the way the
20 patentee did that is just saying "at least one of," so one of
21 the A, B, or C, not all three together, because that wouldn't
22 be consistent with the way the claims are written and how the
23 specification is written.

24 THE COURT: The language of the Federal Circuit though
25 seems to be against you in that.

1 MR. SMITH: I don't agree, your Honor. They cited to
2 a couple of cases that talk about using the "at least one of"
3 language. But if you look, it's a little different because the
4 language here says "at least one entitlement," and then it says
5 including these other things. So an entitlement, including at
6 least one of. So the entitlement is singular, and it's
7 describing different types of entitlements. It's not saying
8 the entitlement has to be these three things, and I think what
9 the Federal Circuit has said is where you have a situation like
10 this where Kickstarter is suggesting there's some ambiguity
11 here, that it doesn't mean "and" and it doesn't mean "or," you
12 look to the specification, and cases cited by Kickstarter fully
13 support this, you look to the specification and say does the
14 specification support that kind of construction, and it
15 doesn't. And nor do the claims.

16 THE COURT: Why do you use the word "and" then? This
17 is your language.

18 MR. SMITH: Right, your Honor. I didn't prosecute
19 this.

20 THE COURT: I know it's not your language, but on
21 behalf of the patentee, you're stuck with the language that the
22 patentee uses in the patent. Right?

23 MR. SMITH: Right.

24 THE COURT: Why do they use the word "and" if it
25 really means, as you say now, "or"?

1 MR. SMITH: Because I think they've used that same
2 language in multiple claims, always meaning one, not meaning
3 all. And I can point you to a couple of examples where they
4 use the exact same language in the other claims. Here is claim
5 eight, "a system according to claim one wherein the offer is
6 presented in at least one of the following manners, an auction,
7 a point of sale, a subscription, a license, and a sponsorship."

8 There's nothing in here that suggests that "at least
9 one" means all of those things have to happen. You have to do
10 it in an auction, a point of sale. It wouldn't make sense that
11 you're now doing it in every way.

12 In claim 24, the patentee also uses that same language
13 where it says "an offer is presented in at least one of the
14 following manners" and gives the list of the specific manners.
15 So I think the patentee reasonably used that language, "at
16 least one," to make clear that it's talking about one of a list
17 of things, and although it used the word "and," I don't think
18 "and" is interpreted to mean all of the above because in the
19 context, "at least one of" has to modify that. Otherwise, why
20 would you use it?

21 THE COURT: You don't want construction of the word
22 "and," you want a construction of the words "at least one."

23 MR. SMITH: That's right, your Honor.

24 Our view is it's clear from the patent claims, it's
25 clear from the specification that the "at least one" language

1 never meant to encompass every one of those, because then you'd
2 look at these other claims, and it would make no sense if you
3 used that interpretation.

4 THE COURT: All right.

5 MR. SMITH: Your Honor, dependent claims also support
6 that view as well because if you go to page 32 of the patent,
7 it talks about an entitlement and it says, "converting the
8 received entitlement into a digital format." Claim 32 of the
9 patent. This is a dependent claim that's referring back to the
10 single entitlement and referring to saying you're going to
11 convert the single entitlement into a digital format. That
12 dependent claim would make no sense if the entitlement had to
13 be a service, a patronage, and a product. How are you
14 converting a service into a digital format? Or how are you
15 converting a patronage into a digital format? It doesn't make
16 any sense. That dependent claim would be meaningless because
17 it would be suggesting that you're doing something that you
18 can't do.

19 THE COURT: Thank you, Mr. Smith.

20 Mr. Bickham, do you want to talk about the
21 software-related terms?

22 MR. BICKHAM: Your Honor, would it be okay if we
23 addressed some of the comments and just wrap up the nonsoftware
24 tools?

25 THE COURT: Two or three minutes.

1 MR. ALLAN: Your Honor, I'll address very quickly the
2 fans, the clients, and the software tool limitations.

3 In terms of fans, I think this is very
4 straightforward. It's defined. The common denominator is
5 there. The fact that the "including, but not limited to"
6 language may allow for others, other individuals, does not
7 change the fact that the definition, according to the patent,
8 the individual, whoever it is, a mentor, a follower, a taxicab
9 driver, a boat captain, whoever it is has got to be interested
10 in the artist's work. We've belabored this a bit, so I won't
11 continue. I don't think there is any inconsistency. We're not
12 trying to limit this at all beyond what they've spoken about.

13 THE COURT: All right. Go ahead.

14 MR. ALLAN: In terms of clients, again, there are a
15 number of different clients that are referenced in the patent,
16 in the specification, but claim one speaks to one specific type
17 of client. You heard nothing different from opposing counsel.
18 We're not trying to limit this in any way. We're trying to
19 provide the correct context to the term that's at issue in the
20 one claim that is at issue. That's claim one.

21 Finally, with respect to the --

22 THE COURT: Patron?

23 MR. ALLAN: No. Mr. Bickham will handle that in just
24 a minute.

25 "Entitlement including at least one of," when I think

1 of this, I think of what is the definition of "is."

2 THE COURT: President Clinton told us that.

3 MR. ALLAN: President Clinton. Exactly.

4 They said "and," your Honor. They didn't say "or."

5 And the Federal Circuit and the Touchtunes case by Judge Sweet
6 make abundantly clear that Mr. Smith's argument that we're
7 reading "at least one of" out of the claim is absolutely wrong.
8 Those cases a hundred percent found that this definition, the
9 phrase we're asking your Honor to construe, is a legitimate,
10 unambiguous, clear, plain Strunk & White version of the English
11 language, and it means "and." There's just no other way to get
12 around it. There is a presumption that the plain language, the
13 ordinary meaning that they've offered and have put in the
14 language controls. There's nothing to overturn that
15 presumption, your Honor.

16 Thank you.

17 THE COURT: Not the language at least one?

18 MR. ALLAN: I'm sorry?

19 THE COURT: Not the language at least one?

20 MR. ALLAN: No. It's at least one of three different
21 things, and it's exactly the same situation that Superguide
22 spoke to.

23 THE COURT: Thank you.

24 Mr. Bickham.

25 MR. BICKHAM: Your Honor, just briefly regarding the

1 term "patron," ArtistShare basically acknowledges that there
2 are two types of patrons described in the specification. And
3 the language that they pointed to was from column 17 in the
4 patent, and we refer to column 18. Column 17 is up on the
5 screen, your Honor.

6 THE COURT: I can't see that far. Where are you in
7 column 17?

8 MR. BICKHAM: Line 41, your Honor.

9 THE COURT: Okay.

10 MR. BICKHAM: So they were talking about figure 23,
11 and in the middle of that column, around 45, it says, "upon
12 registration, the fan, now a patron."

13 Directly across from that, in column 18 and down a
14 little bit, down to line 54, this talks about the other kind of
15 patron. And line 55 says, "a patron is a fan who registers
16 with an artist and who provides monetary contribution to a
17 project." That's the patron of the artist. So there are two
18 kinds of patron, and that's our point. There are two kinds of
19 patron, and the claims only refer to one kind. They don't
20 refer to the member patron. They refer to the patron of the
21 artist.

22 THE COURT: The patron who contributes?

23 MR. BICKHAM: The patron who contributes, yes, your
24 Honor.

25 The claim language that they pointed to in claim 36,

1 where the patron is registered, that's after the patron has
2 accepted the offer. That's after they've crossed the threshold
3 and become patron No. 2, patron of the artist.

4 In claim 17, your Honor noticed that the patron has to
5 express an interest before their information is stored. Now,
6 that's an affirmative act. And registering, it's an
7 affirmative act with an artist, and that's beyond mere
8 registration.

9 THE COURT: Okay. I understand the dispute here.

10 Do you want to go on to the software-related terms
11 now, please?

12 MR. BICKHAM: Yes, your Honor.

13 These software-related terms were added at the end of
14 the prosecution, and they don't appear in the specification.
15 Software tools to manage at least one project, not in the
16 specification. Kickstarter proposes this definition. It's
17 computer programs that do a number of things.

18 Project management software. ArtistShare has their
19 definition. There's been some to-do made about what is the
20 definition of a software tool. To us, that's a side issue.
21 That's a sideshow. A software tool is a computer program.
22 It's software. A software tool is software. And a tool, when
23 it refers to a tool in the later claims, that's software.
24 That's the same thing. It's a program that does something.
25 It's not a hammer, it's not a saw. It's a tool.

1 We have a long construction here, your Honor. But we
2 didn't come up with this. These are from the specifications,
3 actually. We went to the claim itself. Software tools to
4 manage a project is big. So under Phillips, you go to the
5 specification, there's nothing. You go to the prosecution
6 history, not in the original claims. It was inserted in May of
7 2010. Seven years after the application was filed, it was
8 inserted into the claims.

9 Earlier, in the prosecution, the applicant,
10 Mr. Camelio, has already started saying that the functionality
11 of the tools provided to the artist using the ArtistShare
12 system, the invention, are not anticipated by the prior art.
13 So in the December 2009 amendment, they're already equating the
14 system with the invention. And then, after that, the invention
15 was demonstrated to the examiner. The examiner says, Brian,
16 that's Mr. Camelio's first name, showed a Web site,
17 ArtistShare.com, his invention. So the invention is
18 ArtistShare.com.

19 Mr. Camelio defined project management tools in this
20 figure seven, and it has a number of features. And this is
21 where we get our definition. That's the project management
22 tools. This right here says "managed project," and these are
23 the tools.

24 In May of 2010, he explained that to the examiner, and
25 he says the full listing of the management tools, project

1 management tools, that are available to the artist, are set
2 forth in figure seven under the block managed projects. That's
3 what we just showed. It includes the ability to view 11
4 different functionalities. Those are the things in our
5 definition.

6 He goes on to say each of those functionalities is set
7 forth in greater detail in figures eight through 18, and this
8 has the same 11 functionalities. It's also under the project
9 management box. This was used in ArtistShare's slides. Just a
10 couple of minutes ago, it was describing the general overview
11 of the invention, the patent. It's consistent. That's what
12 Camelio said to the patent office. It's very clear.

13 So where the term is not in the specification and it's
14 ambiguous, the Court has to look through the lens of the person
15 of ordinary skill in the art. What guidance in the
16 specification or the prosecution history does a person have to
17 know what things are being discussed? He has the exact words.
18 It's not a disclaimer situation. He's defining it. He's not
19 disclaiming it. This is an affirmative definition.

20 He goes on, same page, "the specific management
21 function, the project management tools, provided to the artist
22 pursuant to the ArtistShare system, differentiate the instant
23 invention from all cited prior art."

24 Your Honor, we're just taking the definition that
25 Mr. Camelio told the examiner and told the public. So

1 ArtistShare's construction is wrong for a couple of primary
2 reasons. First of all, they want to define software tools as
3 computer-aided features. Software tool or a program, I don't
4 see how that's a computer-aided feature. Feature is vague. If
5 we tell a jury that they are to look for a computer-aided
6 feature in the accused product, that's not going to be helpful
7 for them. If we tell them computer program, that's helpful.

8 They turn their backs on what Camelio said as far as
9 seven and eight are essential parts of the invention. He
10 defined that term. We're not weaving in limitations and it's
11 not a disclaimer. He said that's what it is. And a project,
12 ArtistShare would have the Court define project as representing
13 a creative work, and I don't see how a project, it may be a
14 creative work, it's not representing a creative work. The word
15 "project" is fairly simple.

16 Kickstarter's construction is the only one that has
17 support in the specification.

18 THE COURT: All right.

19 MR. BICKHAM: Regarding software tools to manage
20 communications through said patron database. Same arguments
21 with respect to software tools, but we're not going to talk
22 about that. But we're focusing on managed communication
23 through said patron database. These were carefully selected
24 words. They were put into the claim on September 7, 2010.
25 This was the sixth amendment to the claims. This was the

1 amendment here. It was originally put into the claims in
2 December of 2009. And it read like this, "software tools to
3 manage communications directly to patrons."

4 Now, "directly to patrons," that's not in the issued
5 claim. He gave up that up. He turned his back. He changed it
6 in view of the prior art. The examiner said, Well, the prior
7 art shows direct communications between an artist and/or
8 creator and the public. This is not from the '887 patent.
9 This is from a prior art patent that was discussed by the
10 patent examiner. And this is actually part of the portion that
11 the examiner says, there it is, interactive dialogue with Web
12 site viewers.

13 So ultimately, in September of 2010, he makes this
14 change in the claims. So now he takes out "directly." He adds
15 in "through said patron database." So "directly" is gone and
16 the communication goes through the patron database. And that's
17 clear.

18 THE COURT: Why do you use the word "directly"? In
19 your definition, you use the word "directly," don't you?
20 Computer program used by the artist or account manager to
21 enable control or exchange of information with a patron wherein
22 the patron receives the information directly. That's at page
23 33.

24 MR. BICKHAM: Yes, your Honor.

25 We do use that, and we use the "directly" to talk

1 about the patron database. The communication goes, going
2 through the database means it's going through the database.
3 It's going artist, database --

4 THE COURT: Patron?

5 MR. BICKHAM: Patron. Yes, your Honor. That's
6 through the database.

7 THE COURT: Maybe I'm a little bit slow this morning,
8 but you say "directly" was taken out of the patent claim?

9 MR. BICKHAM: Yes, your Honor. "Directly" was taken
10 out.

11 THE COURT: Then you have it in here in the definition
12 you want.

13 MR. BICKHAM: The communication, your Honor, was
14 directly between the artist and the patron. Now, it's artist,
15 database, patron.

16 THE COURT: Okay.

17 MR. BICKHAM: Directly through the database is
18 different than directly to the patron, which is what was given
19 up. And so the word "directly" might be a clumsy word in our
20 definition, but the point is it's not going directly between
21 the artist and the patron.

22 THE COURT: All right.

23 MR. BICKHAM: So there's more prosecution history on
24 this. There's this Massey patent, and that's the one I just
25 showed a moment ago.

1 THE COURT: Yes.

2 MR. BICKHAM: I'm not going to belabor that point.

3 Through the patron database means directly. This addresses
4 your Honor's point, slide 74.

5 Moving to the next term, "software tools provided to
6 the artist or account manager to design, create, and implement
7 an artist-specific Web page." Again, under the Phillips
8 instructions, we go to the claim. Software to implement the
9 artist-specific Web page, we think, is ambiguous. We go to the
10 specification. That's not in the specification. We go to the
11 prosecution history and it was inserted, and we construe this
12 as artist specific means artist specific.

13 Computer programs used by the artist or account
14 manager to design, create, and implement a web page. That's
15 pretty much from the claim itself. It's from the claim itself
16 and dedicated to the marketing of a single artist's projects.
17 The whole patent talks about being artist specific and not
18 project specific. And so under this definition, a Web site
19 that is an artist-specific Web page would have one project.
20 The artist has two projects. It would have both of them, but
21 it's not going to have some other artist's work on their own
22 artist-specific Web page. That defeats artist specific.

23 The criticism here comes down to what is the artist.
24 We look at the patent and the specification for what is the
25 artist, and column six and column ten give us guidance. Artist

1 may be an individual of various types, or it could be other
2 individuals. It can be an individual or it can be members of a
3 band, a singular unit. A band is an artist. It says that
4 right in the specification, "an entity (such as a band)."

5 Artist-specific Web page was added by amendment in
6 December 2009. And there's discussion about how the
7 ArtistShare system is indeed artist specific.

8 Mr. Camelio differentiated the claims to the
9 ArtistShare system from the prior art by saying prior art is
10 project specific. ArtistShare, in the claims, is artist
11 specific.

12 THE COURT: What's the difference between project
13 specific and artist specific?

14 MR. BICKHAM: I think the difference and how that's
15 applied is if I'm an artist and I have three projects, those
16 projects are going to be on my dedicated Web page. And if I
17 have three projects, I'm not going to have three
18 project-specific Web pages. So if I'm an artist who writes a
19 song, does a movie, and something else, I'm not very creative
20 to come up with these things.

21 THE COURT: Sculptor.

22 MR. BICKHAM: Something, yes. Those three things
23 would go on my artist-specific Web page. They're not going to
24 go on different project Web pages. And that's the difference.

25 THE COURT: I'm still having trouble grasping what the

1 difference is. I understand artist specific. That means I
2 look up Mr. Smith or you, Mr. Bickham, and say what have you
3 done. Now, if I wanted a music project, some composition of
4 old style rock and roll, I wouldn't be able to find that? I
5 wouldn't look on that database, I'd look for an artist? Is
6 that the difference?

7 MR. BICKHAM: The database might or might not have
8 that, but the claim requires providing the artist the tools to
9 build an artist-specific Web site.

10 THE COURT: So it's an artist-specific Web site, and
11 that excludes projects?

12 MR. BICKHAM: If the projects are done by different
13 artists, yes.

14 THE COURT: All right.

15 MR. BICKHAM: So, again, software tools we don't think
16 are computer-aided features, and the portion of artist specific
17 that ArtistShare bases their construction on is based on the
18 false premise that an artist has to be a single individual.

19 Finally, your Honor, software tools to present the "at
20 least one project." Again, as with the other software tools,
21 start with the claim itself. "Software tools to present a
22 project," we believe, is ambiguous. We don't think a jury will
23 know what that is. We go to the specification. It's not in
24 the specification. It's not in the original claims. It was
25 inserted by amendment. And we based our construction from

1 Mr. Camelio's own words.

2 So our position is that a person of ordinary skill in
3 the art reading the prosecution history will know that the
4 project, that the software tools to present the project are
5 indeed what he said. And there's a list of features. And like
6 the software to manage a project, these features come from the
7 prosecution history and from the figures in the patent.

8 First of all, there's no description of Mr. Camelio
9 saying that the ArtistShare system is the invention. We're
10 clear about that. We looked for support in the specification
11 for the term. The only support we could come up with for
12 presenting the project are the figures that talk about Web
13 pages, the project Web pages or the artist Web pages. So
14 figure 32 has a number of features to it. And these are all
15 under the project page, such as figure 32 of the patent, and
16 there's a long list of things under the artist's public pages.
17 Towards the bottom of that list is the artist's project page.
18 The claim term is "tools to present a project." So under the
19 project page, there are a number of different features,
20 descriptions, listen, watch. And that's where we get our
21 construction.

22 THE COURT: So the page headers?

23 MR. BICKHAM: Yes, sir? Yes, your Honor.

24 We've said a couple of times, and in relation to these
25 software tools to manage projects, that they're not in the

1 specification, and your Honor doesn't have to take our word for
2 it, although you can see it for yourself. But there's a
3 pending application based on this same specification, the same
4 one we're talking, the same specification we're talking about.
5 And the patent office said a month or two ago, the examiner
6 said "the examiner has searched the entire specification but
7 couldn't find any description of such tools." And later, she
8 says what are the tools. How do they work? The examiner does
9 not know and the specification doesn't say.

10 Then, later, in the same office action, what are the
11 tools. Each of these claims that they're talking about refers
12 to tools. It's confusing. What are each of the tools, so
13 we're not arguing that these statements from the examiner are
14 to be construed the claims because, frankly, they don't give any
15 kind of guidance on what that term means. We're using these
16 statements to show the Court that the software tools to manage
17 the projects aren't shown in the specification of the '887
18 patent.

19 Now, ArtistShare says that software tools are
20 computer-aided features -- we disagree with that -- to present
21 a project. They say a project is representing a creative work.
22 I think that our position is a project is not representing a
23 creative work. It could be a creative work. But ArtistShare's
24 construction doesn't have any support. And that's all we'll
25 discuss on these terms for your Honor.

1 THE COURT: All right.

2 Now, what you handed up to me is Exhibit A?

3 MR. BICKHAM: Yes, your Honor. That's the joint claim
4 construction chart that the parties submitted in October.

5 THE COURT: Okay.

6 Mr. Smith.

7 MR. SMITH: Thank you, your Honor.

8 If you have a preference for a specific order, I'll go
9 in that order. I was going to start with the last terms.

10 THE COURT: Go ahead. Any way that you wish.

11 MR. SMITH: Thank you, your Honor.

12 THE COURT: Just point me to the charts in your book.

13 MR. SMITH: That would be great.

14 I was going to start with the tools to present the
15 project, which is on slide 62 of our slide deck, and the reason
16 I wanted to start here is I think this helps explain some of
17 the problems that we have in the constructions that we're
18 seeing from Kickstarter.

19 Primarily, what they're doing is adding in limitations
20 that are found nowhere in the claims themselves. What are they
21 doing? They're explicitly saying we're looking at the
22 specification and we're taking out of the specification and
23 putting those limitations now into the specific claims. That
24 is clearly contrary to claim construction law, that you take
25 something from a specification and you put it into the claims

1 themselves. And so they say that they're doing this because --

2 THE COURT: I may be wrong here, but they're saying
3 it's in the claims. But the language of the claim is not
4 defined by the specification because there's nothing in the
5 specification. So they've gone to the diagrams to look for it
6 because that's part of the patent.

7 MR. SMITH: Right. The diagrams are part of the
8 specification, but it almost seems like there's an anomaly here
9 because, on the one hand, they're saying it's not in the
10 specification. On the second hand, they're saying, Here, take
11 this from the specification and put it into the claims.

12 THE COURT: It's from the charts, isn't it?

13 MR. SMITH: That's part of it. Yes.

14 THE COURT: From your standpoint, that's part of the
15 specification.

16 MR. SMITH: It is. There's no dispute, and you're not
17 going to hear Kickstarter and ArtistShare argue over whether
18 the diagrams are part of the specification. They are.

19 They're trying to put limitations into the claims that
20 we submit just don't belong there, and here is a very clear
21 example of what they're trying to do. There's no basis for the
22 argument that the words "present a project," so the claim
23 language says "tools to present at least one project," that
24 presenting a project all of a sudden has to include all of
25 these various different things in order to present the project.

1 In fact, they don't even define what the word
2 "present" is. So the parties aren't disagreeing and saying,
3 Oh, we need to construe what the word "present" is, and it
4 doesn't seem like they're disputing what the word "project"
5 means except that they're turning it around and saying instead
6 of construing the word "project" we're interpreting the word
7 "project" to now mean something different, and they now call it
8 an artist project page.

9 So they have taken the word "project," which is
10 clearly within the patent and in the specification, they've now
11 taken the word "project" and changed it, and now they seem to
12 be defining something other than what's actually in the claim
13 language itself. That's clearly at odds with the way claim
14 construction is supposed to happen, where you're supposed to
15 look at the claim language itself. They're not even disputing
16 the words "present" and "project," which are part of the claim
17 language. Instead they're grafting new terms into the claims
18 and then trying to construct new claims and terms that weren't
19 there in the first place.

20 THE COURT: Can you turn to figure 32 of the '887
21 patent?

22 MR. SMITH: Sure.

23 THE COURT: That seems to be the source for the
24 plaintiff's definition here, but under the header "artist
25 project page," it talks about "listen, watch, downloads,

1 personal," and so forth. What's the problem with defining it
2 that way?

3 MR. SMITH: Because you're doing exactly what the
4 Federal Circuit has repeatedly admonished not to do. You're
5 taking something that is just a description of one of the
6 embodiments in the patent and you're saying now I'm going to
7 say that the claim, although broader than that, has to be
8 limited to these very specific examples, when there's nothing
9 to support that that would be the case, that to take the word
10 "present" and now say present has to now mean eight or ten
11 different things and throw that into the claim.

12 THE COURT: Here is the trouble that I have. You have
13 a patent that was filed, an application that was filed in the
14 early part of the first decade of the 21st Century. It goes on
15 for eight or nine years, and most of it consists of the patent
16 applicant refining his claims, narrowing his claims. Right?
17 And now you're saying regardless of the prosecution history and
18 the narrowing that's been engaged in, now we have to read the
19 claims very broadly. I think that if I understand
20 Mr. Bickham's argument, you've got to take the patent the way
21 it was prosecuted in the office with all its limitations. You
22 seem to be walking away from those limitations.

23 MR. SMITH: No, not at all.

24 THE COURT: You say, in figure 32, that that's just a
25 specific embodiment and you have to read the claim. And the

1 claim you read is broader than that, correct?

2 MR. SMITH: That's correct, your Honor. There has to
3 be a reason. You can't just say because the patent, which
4 every patent goes through this history of back and forth with
5 the patent examiner asking questions.

6 THE COURT: Not many go through this process for eight
7 years, do they?

8 MR. SMITH: Oh, yes.

9 THE COURT: Really?

10 MR. SMITH: Oh, yes. The fact of the matter, as you
11 saw from the initial slide, the patent office, I think, waited
12 five years before actually even telling the patentee what its
13 initial reaction to the patent was. So there was an initial
14 like five years, nothing happened. Just because the patentee
15 filed the patent application with the Patent & Trademark
16 Office --

17 THE COURT: What was going on during those five years?

18 MR. SMITH: We have no insight into what goes on
19 within the Patent & Trademark Office in D.C.

20 THE COURT: So from the time they picked up the
21 application, three years, is not abnormal.

22 MR. SMITH: No, not at all. Patents take varying
23 amounts of time to get through the patent office. The patent
24 office is notoriously slow, but this history that they point
25 out to suggest that there was something unusual, that this

1 process of back and forth is some odd thing, happens with every
2 patent. Every patent goes back and forth. The examiner will
3 submit a rejection. The patentee responds to it. There's a
4 back and forth, a give and take, that takes place in every
5 single one.

6 What's important here, your Honor, as you've pointed
7 out, is the claims are what govern the scope of the invention.
8 Here, they haven't pointed to anything, your Honor, where the
9 tools to present at least one project were limited, where the
10 patentee said to the examiner, Oh, no, our tools to present the
11 project, those are different, that they're limited to what's in
12 here. They haven't pointed to anything that would suggest that
13 the patentee limited the claim in any way so that presenting
14 now has to include very specific limitations that are found in
15 the figure. And, in fact, they point to portions of the
16 specification. They try to convince you that there's something
17 in the prosecution history, but you go through it and there are
18 portions of the prosecution history that never deal with this
19 term. Never. So they're trying to get you to agree to take
20 things from the specification and put them into the claims when
21 there's no basis for doing that.

22 THE COURT: You do agree though whatever Mr. Camelio
23 said in response to these questions raised by the patent
24 examiner, that's part of the patent?

25 MR. SMITH: That's part of it.

1 THE COURT: We have to read the patent against the
2 limitations or representations that he made, whatever they
3 were.

4 MR. SMITH: The patent, the history that was created,
5 as far as that back and forth, is relevant to the understanding
6 of what the claims mean. It's part of the intrinsic record.
7 The Federal Circuit has said it's less reliable than looking at
8 the claims in the specification because it's ambiguous
9 sometimes to know exactly what was going to between the
10 examiner and the patentee. So the Federal Circuit has said
11 prosecution history is slightly less relevant because of the
12 ambiguities that take place, that belong there. That's why the
13 Federal Circuit has been so clear to say the only time we're
14 going to actually take something from the prosecution history
15 and limit what the claims say is when there's a clear disavowal
16 of claim scope. So we're not just going to do any statement
17 that the patentee say all of a sudden changes the scope of the
18 claims. No, it's not the law.

19 The law is there has to be a clear statement that gets
20 you a disavowal from the scope. That's why it's critical that
21 in looking at the arguments being made, it's not just simply
22 that the patency said this to the examiner, therefore, you
23 don't get any of that claim scope. That's not how it works. I
24 think here is a perfect example of Kickstarter really trying to
25 convince you that this claim should be limited when, in fact,

1 they can't point to something that shows you where they limited
2 that particular term.

3 It also goes against the notion that the Federal
4 Circuit has said you don't read embodiments in the claim.
5 Bedrock claim construction principle.

6 How to construe this term, "tools to present at least
7 one project" are fairly clear. Kickstarter hasn't really
8 pushed up our construction of what it means to present or what
9 it means for there to be a project. There seems to be some
10 dispute over what tools are, but that doesn't seem to be the
11 focus of their argument as to what tools, features, or computer
12 programs. In some aspects of their brief, they agree with us
13 when we use the words "software tools" and say yes, it's
14 computer-aided features. In other places they disagree. Today
15 they seem to be disagreeing with us. It's not entirely clear
16 what their position is.

17 THE COURT: What do you mean by tools?

18 MR. SMITH: Tools we take to be features.

19 THE COURT: What do you take features to mean?

20 MR. SMITH: Features could be a different things that
21 allow a user to work with the system that is being provided.
22 So the system is going to show you a Web page, for example.
23 There are going to be many features on there that allow you to
24 say you could download an image. That would be a feature.

25 THE COURT: Does tools mean anything other than

1 software?

2 MR. SMITH: I think tools can be software-related
3 tools.

4 THE COURT: I know that. But my question was: Does
5 it mean anything else other than software?

6 MR. SMITH: I think tools is more, I look at tools as
7 those being those are the features that the software provides,
8 and in other parts of the claim they call out and say software
9 tools. So I think tools are sort of things that are going to
10 be aided by the software that's running on the server.

11 THE COURT: What was the last part, aided?

12 MR. SMITH: Aided, meaning when you look at a
13 particular Web page and it provides certain features to you, in
14 order for those features to be presented to you, something has
15 to be running on the server to present those particular
16 features to you.

17 THE COURT: Okay.

18 MR. SMITH: So tools, just things that you can use on
19 that Web page that will allow you to present your particular
20 creative work.

21 THE COURT: Let me ask it one more time. How does
22 that differ? Doesn't that mean the tools and software are
23 synonymous?

24 MR. SMITH: I wouldn't say tools and software are
25 synonymous. I think software tools and tools, those two terms,

1 I think, are very closely related because software tools are
2 features that are being implemented by the software. And
3 tools, I think, are features that are ultimately implemented by
4 software. The claim doesn't specifically require it to be
5 software tools, but I think at the end of the day, you're
6 looking at the software tools that are presenting it to the
7 user. Even though the claim doesn't use the word "software," I
8 think you get that impression.

9 In trying to define what is a project, Kickstarter
10 doesn't describe what a project is. Project is described in
11 the patent, talks about representing the creative work. We've
12 used that as our understanding of what a project is, if project
13 has to be defined.

14 I've already talked about the fact that Kickstarter's
15 trying to pull in all of these limitations from figure 32, give
16 you one of many cites to the Federal Circuit saying that's not
17 appropriate. And you've heard Kickstarter talk about this is
18 just one of the embodiments of the invention, and they want to
19 basically limit the claim to that one specific embodiment.

20 So unless there are other questions, I was going to
21 move on to the other software tool features.

22 THE COURT: Yes, please.

23 MR. SMITH: I'm going to go back to the software tools
24 to manage. Slide 37 is the first place we have that.

25 THE COURT: Go ahead.

1 MR. SMITH: So here, just to frame some of the debate,
2 there seems to be some disagreement about what software tools
3 are. I thought, based on Kickstarter's initial briefing, that
4 we had come to an agreement on what software tools were because
5 in their brief they specifically say with respect to one of the
6 claim limitations that they agree with us, they indicated they
7 agree that software tools with respect to one of the
8 limitations meant computer-aided features. So we thought we
9 were in agreement and that the parties no longer needed to
10 debate what it is to mean a software tool. I've pointed to the
11 Kickstarter's opening brief at page 14, where they made that
12 statement. I thought we were in agreement, but today they
13 seemed to be saying that our definition of software tools isn't
14 correct, which I'm not sure I can reconcile with what they say
15 in their brief.

16 The next portion of the claim term requires that it's
17 software tools to manage at least one project. Here, it's
18 unclear. Kickstarter never really defines what the word
19 "manage" is. It seems to be just again creating limitations
20 into the claim based again on what the specification status is,
21 so taking something from one of the figures and saying these
22 are the things that we're going to say the computer tools need
23 to do, but it's unclear whether or not that's how they're
24 defining "manage the project" or if they're not defining
25 "manage the project" at all.

1 In our view, a project, in our view, the notion of
2 managing the project is clear. It's just managing at least one
3 description of a creative work. Again, this goes back to the
4 notion of what is a project. Kickstarter doesn't seem to be
5 defining what a project is, and so if it does need to get
6 defined, we propose it be defined in this manner.

7 Specification supports the notion of a project being a
8 creative work or representing a creative work. Kickstarter,
9 like the other claim term that we're talking about, tools to
10 present, here, Kickstarter takes the figure seven and indicates
11 that everything that you see in the figure seven should now be
12 read into the claims when it talks about managing a project.
13 Again, this would be the exception, not the rule, to claim
14 construction, where you would be taking an embodiment and
15 reading that embodiment directly into the claims. The patent
16 history is specific that the embodiment of the claim is just
17 one example. They're not intended to be limiting in the
18 claims.

19 Kickstarter spends a lot of time arguing about the
20 prosecution history relating to managing at least one project.
21 Again, in order for them to satisfy what would be required in
22 order to say that there was some disavowal, you need some
23 unambiguous, clear disavowal. Again, I don't think they ever
24 present to you anything that suggests that there was a
25 disavowal of claim scope. What they do is they point to

1 several portions of the prosecution history where what is
2 happening is the patent examiner has found some prior art
3 references that are dealing with systems that are looking at
4 how an artist interacts with a recording studio or something
5 similar to a recording studio.

6 You may remember at the beginning of the presentation
7 I was talking about how some of the problems different artists
8 are dealing with recording studios and recording companies, and
9 in each case the patentee was continuing to remind the
10 examiner, No, our invention is different. We're talking here
11 about what you can do where the fans or the fans or patrons can
12 be able to help an artist, we're different from these recording
13 and distribution companies that you're seeing in the prior art,
14 and clearly started to distinguish that. And they point to and
15 they say, Well, no, no, they said there are some unique
16 software tools, and what they do is they take every single one
17 of those and say we should read those into the claims. But the
18 patentee never said every single one of these tools is required
19 in order for us to distinguish the prior art.

20 No. They don't even mention the specific tools. They
21 just say there are software tools. This is one of the benefits
22 of our invention. It allows artists to now have these tools
23 that allow them to manage their projects. So now they're not
24 relying on a recording company or a production company to go do
25 that for them. Now they're going to do it; they're in control.

1 And that was the important distinction they were making to the
2 patent examiner. It wasn't this notion that, Oh, we need a
3 list of 15 software tools in order to distinguish the prior
4 art. They never said it, and it wouldn't make sense that they
5 would list out eight or ten specific tools that would be
6 required.

7 What Kickstarter says is they referred to the fact
8 that there were tools, and, if you look at the figure, we can
9 see where the tools are, so let's take those tools and put them
10 into the claim. And I submit that's just not the right way to
11 construe the claims.

12 THE COURT: All right.

13 MR. SMITH: I'm going to move on, your Honor, to
14 software tools to manage communications to the patron database.

15 THE COURT: Yes.

16 MR. SMITH: This starts at slide 33 of our slide deck.
17 Here, again, we have software tools. I'm not going to repeat
18 the argument.

19 First of all, software tools, I thought we were in
20 agreement what software tools meant. Manage communications, we
21 have a little bit of debate as to what manage communications
22 means. We interpret manage communications to enable and/or
23 facilitate the exchange of information. They require that it
24 must enable and control the exchange of information. We don't
25 think it's that limiting, and then through the patron database,

1 we interpret to mean with the aid of the patron database. They
2 require that somehow the information comes correctly from the
3 patron database, which we submit isn't supported by the claims
4 themselves, let alone by the specification.

5 THE COURT: Mr. Bickham, I thought we got rid of the
6 word "directly" and you were through the database.

7 MR. BICKHAM: Yes, your Honor.

8 THE COURT: Is this an error here when Mr. Smith puts
9 out your Kickstarter proposal because it says "directly from
10 the patron database"?

11 MR. BICKHAM: Your Honor, the claim removed "directly"
12 and changed and put in its place "through the database. Our
13 construction here is correct, that our position is that the
14 communications need to go artist, database, patron.

15 THE COURT: Where do you, in your stack of charts,
16 deal with this issue of whether it's through or directly? We
17 just discussed it. Page 33, chart 66?

18 MR. BICKHAM: Yes. Yes, your Honor. And the point,
19 your Honor, was not directly to the patrons between the artist.
20 That was the point that we were making in discussing it.

21 THE COURT: I see.

22 MR. BICKHAM: So the term should not be construed as
23 communications, artist directly to patrons. It's
24 communications, artist, database, patron.

25 THE COURT: Go ahead, Mr. Smith.

1 MR. SMITH: Just to pick up on that term, how the
2 communications come, they're adding these new limitations into
3 the claims that aren't part of nearly the language that just
4 requires managing communications through said patron database.
5 The language is "managing communications through said patron
6 database." Now they're requiring certain things that
7 specifically happen. You have to both enable and control the
8 exchange of information, and now somehow, it's unclear how,
9 that the communications are coming directly from the database
10 to the patron. It's unclear exactly how that would work or
11 where they would find any support in the patent that would
12 suggest that this information is coming directly from the
13 patron database.

14 In fact, if you look at claims 17 and 32, which I will
15 put up, 17 is up there now. Here, if you look at what it says
16 when it talks about managing communications to the patron
17 database, at about line 34, on claim 17, it says "managing
18 communications through said patron database from the artist or
19 account manager to patrons." So, again, the exact language
20 from the claim suggests that communications are coming from the
21 artist to the patron. So there's direct communication between
22 those two entities. And we again say "through said patron
23 database" just means that the patron database has information
24 that allows the artist to communicate with the patron because
25 the database, as we discussed earlier, can have contact

1 information for the specific patrons. So it's not that the
2 database is sending its own information to patrons. It's that
3 the artist is able to send communications to the patrons using
4 the patron database because the patron database has this
5 contact information that allows it to do that.

6 Claim 36, I'll submit, has the same or similar
7 language to that in terms of noticing that the managing
8 communications are from the artist or account manager to the
9 patrons.

10 THE COURT: All right.

11 MR. SMITH: Here, looking at what are some of the
12 differences we're seeing here, the specification from the
13 patent itself talks specifically about communicating. It talks
14 about being able to have mailing list drop down, export names.
15 All of these things allow the artist to communicate with the
16 patrons, but it doesn't suggest that the database is
17 communicating directly with patrons. No.

18 What it's calling out is the notion that the artist
19 can get that information from the database and then use it to
20 send communications to the patrons. But there's nothing in the
21 patent that I've been able to find that would suggest that the
22 database is sending communications directly to patrons. I
23 don't think that would make any sense, but I haven't found
24 anything that would suggest that would be the case.

25 Kickstarter, like in some of its other arguments,

1 relies heavily on the prosecution history, suggesting that
2 somehow ArtistShare disclaimed communications that would go
3 directly to patrons. I don't think that would make sense in
4 the light of the way claims are written, where you're managing
5 communications that are going from artist to patron. But even
6 so, if you look at the actual language of the prosecution
7 history that they cite to, and here on I'm on slide 47 of our
8 slide deck, again, what they're distinguishing isn't
9 communications through a patron database. What they're
10 distinguishing is the notion that it's different from what
11 production companies do, which is the production companies are
12 the ones that always communicated with the outside world. The
13 artists had no control over it.

14 Here, in the system that was described by the
15 patentee, here, you now have the artists being able to manage
16 communications with the patrons, and so that's what they're
17 really talking about, this notion that you can now manage
18 communications with your own patrons, which is interesting and
19 different. It's not this notion that now the words "through a
20 patron database" was used. In fact, if you looked at
21 Kickstarter's argument, the argument suggests that by removing
22 the word "directly" we somehow narrowed the claims, which would
23 be a little counterintuitive because if you remove a word from
24 a claim, technically the understanding is you've broadened the
25 claim, not narrowed it. But there is nothing in the

1 prosecution history that suggests that "directly" was somehow a
2 problem and that we had to change it to through a patron
3 database.

4 In fact, the portion that Kickstarter cites to where
5 they say, Oh, the examiner rejected some of the limitations by
6 saying that this prior art patent communicates directly with a
7 patron, the patentee said, No way, I disagree completely. The
8 prior does not disclose communicating directly with the patron.
9 What it does disclose is the production company communicating
10 with these people who are interested or purchasing things. It
11 has nothing to do with the notion --

12 THE COURT: So the dropping of the word "directly"
13 means what?

14 MR. SMITH: I think they just changed the language.

15 THE COURT: Clearly, they changed the language. But
16 what does it mean? Does it have any meaning at all?

17 MR. SMITH: I don't think removing the word "directly"
18 has any meaning at all because they still kept that you're
19 communicating from the artist to the patron.

20 THE COURT: And that to you is the important modality
21 here?

22 MR. SMITH: That's right, your Honor.

23 THE COURT: You've eliminated the record company as
24 the entity in between the artist and the fan/patron.

25 MR. SMITH: That's exactly right, your Honor. And you

1 can see this throughout the prosecution history over and over
2 again where the patentee says, We're different from these guys
3 because we're letting the artists communicate and manage those
4 communications. And how are they doing it, because we've
5 created this database that allows that.

6 THE COURT: And the Massey patent deals with what?

7 MR. SMITH: So the Massey patent has to do with, you
8 could have ownership that you could get in particular rights in
9 a creative work, let's say a record or something. So what
10 they're talking about is the notion that you could give away
11 some of your ownership rights in order to get what you want,
12 and Massey was really talking about having some ability for the
13 production company to be able to talk to the people who are
14 interested in the artist's work but not the artist
15 communicating with the interested people. And they put up a
16 slide that they suggest says, Oh, no, Massey also includes that
17 because it says an interactive Web site. But what they don't
18 tell you is that nowhere does it say the artist is interacting
19 with anyone like a fan or a patron. In fact, the
20 communications are all centered on the production company being
21 able to communicate with the fans or the patrons.

22 THE COURT: Okay.

23 MR. SMITH: I'm just going to move through some of the
24 differences between what Kickstarter's recommending and what
25 we're recommending.

1 Again, they're requiring that now it has to be that
2 the programs have to be used by the artist when the claim just
3 says you're providing software tools. It doesn't say that the
4 artist has to use them in order for the claims to be satisfied,
5 and then also requires that you have to enable and control the
6 communications and that the patron receives information
7 directly from the database. All three of those are new
8 limitations, which the only way they get there is by grafting
9 on new limitations that are really not found in the claims at
10 all.

11 I was going to move on to artist-specific Web page, if
12 that's all right.

13 THE COURT: Yes.

14 MR. SMITH: So artist-specific Web page was part of a
15 larger claim term that Kickstarter asked to construe. That was
16 a claim term that talked about, again, tools relating to the
17 artist-specific Web page. It seems like we're at the point
18 where the parties agree on most of the definitions. It says,
19 "artist agrees with Kickstarter's construction for its
20 limitation," and our construction was "computer-aided features
21 to design, create, and implement an artist-specific Web page."
22 It seems like that portion is no longer in dispute. There is
23 no issue about it. This is the portion we cite to you, by the
24 way, where we thought we were in agreement with Kickstarter
25 about what the words "software tools" mean, but for this

1 specific limitation, really the focus --

2 THE COURT: Let me interrupt here.

3 Mr. Bickham, is this right, that you're now agreeing?

4 MR. BICKHAM: Mr. Smith has said about six times, he's
5 referred to this line in our brief, that line is in our brief,
6 but if we're not in agreement, the position is still what our
7 position is in the joint claim construction chart submitted to
8 your Honor and argued in our papers. That line was intended to
9 convey that the dispute is on what is artist specific because
10 originally, artist specific was --

11 THE COURT: Tell me what the difference is between
12 ArtistShare's proposed construction, "one or more Web pages
13 relating to one or more artists," and your definition, "a Web
14 page that is dedicated to the marketing of a single artist's
15 profits."

16 What's the difference?

17 MR. BICKHAM: Under ArtistShare's construction, your
18 Honor, they can have more than one artist on a Web page.

19 THE COURT: Is that right, Mr. Smith?

20 MR. SMITH: No, your Honor. I think we're actually in
21 agreement on this portion. I don't want to say complete
22 agreement, because there is a distinction here. I think the
23 point where we're talking about this issue of where there's
24 agreement, actually, is the claim language that preceded
25 artist-specific Web page. And it's the language, it's in our

1 footnote. I'm sorry. I don't know if I can make it any larger
2 for you to read, but the footnote is from Kickstarter's brief
3 where it says --

4 MR. BICKHAM: Your Honor, we've admitted that that
5 line is in the brief, and we've said what the intent behind
6 that is and that our position hasn't changed. I don't know if
7 we need to have it said eight or nine times now.

8 MR. SMITH: Your Honor, I was just trying to make sure
9 you understood where there is a dispute and where there isn't a
10 dispute.

11 THE COURT: Actually, my question is very simple now.
12 We have language from ArtistShare and we have language from
13 Kickstarter, and I'm asking what the difference is. I know
14 there are different words, but when you get down to the
15 different words, what's the difference? It's got to be
16 meaningful to a jury.

17 MR. SMITH: Right, your Honor.

18 THE COURT: That's the whole purpose of a Markman
19 hearing, what am I telling the jury as between Kickstarter's
20 proposal and ArtistShare's proposal. I understand there is
21 different language.

22 MR. SMITH: I think that there is a difference,
23 meaning when we first proposed these constructions, there was a
24 concern that when Kickstarter uses the word "single artist's
25 projects," is it referring to a single person, or can it be a

band or an entity? And from the conversation that you had today with Kickstarter's counsel, it seems to be that we're in agreement that an artist is broader than just a single individual. An artist could be multiple individuals. It could be a band, it could be a collection of people, and those would all be considered an artist, and I think that's totally fine. And I think Kickstarter agrees with that, which was one of our bones of contention which is what we thought they were trying to do by using the words "single artist" to suggest that it couldn't be what the patent says an artist is but was more narrowly tailored to something different.

I think based on today we're pretty close to what an artist means.

THE COURT: Mr. Bickham.

MR. BICKHAM: Your Honor, the problem here is in ArtistShare's definition as to one or more artists. Artist in the patent, in the specification, is described as an individual or a collective band, or something like that.

THE COURT: I understood Mr. Smith to say, and maybe I got it wrong, that the artist could have one or more projects, but the projects were always identified with a particular artist. You wouldn't have projects from an artist identified separately as projects and you wouldn't have the projects where one particular artist is shown on the Web page of another artist. Do I have that right?

1 Mr. Smith.

2 MR. BICKHAM: I believe --

3 MR. SMITH: I'm sorry. I thought you were asking a
4 question.

5 THE COURT: I know you were paying attention.

6 MR. SMITH: Most of that is right, your Honor, whereas
7 you can have --

8 THE COURT: You always qualify. You say most of it's
9 right.

10 MR. SMITH: I just want to clarify. If I say yes,
11 it's right, we move on, and it's the clarification that never
12 makes it in.

13 The point I want to clarify is, in our definition, the
14 Web page could have multiple Web pages to it, meaning that you
15 could have one project listed on one page and another project
16 listed on another page.

17 THE COURT: It would always be artist specific.

18 MR. SMITH: It would. It would always be artist
19 specific. That's right.

20 THE COURT: Say you're an artist, you could have
21 multiple projects described on various Web pages, correct?

22 MR. SMITH: Correct.

23 THE COURT: That would not include the artist of
24 Mr. Bickham.

25 MR. BICKHAM: Not unless he cooperated with me and we

1 worked together.

2 THE COURT: Don't give me that. He's a separate
3 artist.

4 MR. SMITH: If he's separate, then it wouldn't.

5 THE COURT: Now what's the difference, Mr. Bickham?

6 MR. BICKHAM: With that, I think we're in agreement,
7 your Honor.

8 THE COURT: All right.

9 MR. BICKHAM: And the only difference -- well, we're
10 in agreement on this. And then the only difference is software
11 tools, is it a feature or is it a computer program.

12 THE COURT: All right. Thank you.

13 Mr. Smith, go ahead.

14 MR. SMITH: Like I said, based on what I've heard
15 today, it sounds like we're pretty much in agreement what an
16 artist means and we're in agreement that the artist can have
17 one project or multiple projects, but as long as they're artist
18 specific, that would be covered.

19 THE COURT: Page 51, we're not defining the word
20 "artist," are we?

21 MR. SMITH: I don't think we need to, your Honor. But
22 initially when we first saw the definitions that were coming
23 through, we thought that there was a dispute as to what an
24 artist is. I think we just want to make sure it's clear that
25 an artist can be a single individual or multiple individuals?

1 That's all we want to make sure is clear, and I think you heard
2 today that is.

3 THE COURT: Multiple individuals, as long as they're
4 collaborating on a work of art?

5 MR. SMITH: Correct, your Honor.

6 THE COURT: There's got to be some unifying force to
7 these multiple individuals?

8 MR. SMITH: That's right, your Honor.

9 THE COURT: What else?

10 MR. SMITH: I think the only other thing was, I think
11 we've resolved it, but I want to make sure. In their
12 definition they refer to projects, plural, that it has to be
13 more than one project. But I thought today heard there could
14 be one or more projects. But with that I think we're in
15 agreement with the artist-specific Web page.

16 THE COURT: You agree an artist can have one project?

17 MR. BICKHAM: Yes, your Honor.

18 THE COURT: One of the records I have at home is One
19 Hit Wonders.

20 MR. BICKHAM: Then they would have artist-specific Web
21 sites with their One Hit Wonder. But if they got a two hit
22 wonder, that would be all on one web site for that artist.

23 THE COURT: Might or might not be.

24 MR. SMITH: You could have multiple Web pages, and
25 that would still be artist specific.

1 THE COURT: Only one artist, but you could have
2 multiple projects. Consider Picasso, he could have a page, as
3 I understand it, for pictures of his work, sketches of his
4 work, drawings of his work, early works, later works. They
5 could be on separate web pages, but they would all be listed
6 under Picasso.

7 MR. BICKHAM: Yes, your Honor. And Mr. Picasso would
8 be central to all of the Web pages.

9 THE COURT: Yes, correct. He would be the dominating
10 feature. He'd be the artist. This would be artist specific.

11 MR. BICKHAM: Yes, your Honor.

12 THE COURT: Anything else, Mr. Smith?

13 MR. SMITH: Nothing else, your Honor.

14 THE COURT: Mr. Bickham and Mr. Allan, do you want to
15 respond?

16 MR. BICKHAM: Just very briefly, your Honor.

17 THE COURT: Yes.

18 MR. BICKHAM: What we are doing with these software
19 tools terms, we're not trying to read limitations into the
20 software claims. Phillips tells us to look at the claim
21 language through the lens of the person of ordinary skill in
22 the art. So looking at the intrinsic evidence that's before
23 him, the file history, the specification, and the claims, what
24 would a person of skill in the art be drawn to to have any kind
25 of definition for these terms that are not in the

1 specification? They're not in there, so he has to go into the
2 prosecution history. What is this term?

3 The prosecution history says the project management is
4 at figure seven. Project management is at figure eight. Those
5 two figures show the same thing. And so the term is being
6 interpreted, and ArtistShare says that Mr. Camelio is a person
7 of skill in the art. We might have a dispute about that down
8 the road, or not, so if that's how he's interpreting the
9 software management features, and he's telling the patent
10 office that it's those features in figure seven and figure
11 eight that distinguish from the prior art, a person of skill in
12 the art's going to see that, and he's going to say, All right,
13 there it is.

14 THE COURT: Isn't a person who gets a patent always
15 skilled in the art? I mean, I thought one of the definitions,
16 as I recall it, you have a college-educated person who is the
17 computer programmer, and Mr. Camelio was not college educated;
18 he's self-taught. So you would say that Mr. Camelio was not
19 one skilled in the art because he didn't meet the
20 qualifications?

21 MR. BICKHAM: I think that we haven't had a chance to
22 depose Mr. Camelio. The Markman hearing is the very beginning
23 of the case.

24 THE COURT: I understand.

25 MR. BICKHAM: So we haven't fully vetted what the

person of ordinary skill in the art is. We thought we set an appropriate level, but what ArtistShare has done, they've said here's the level, Mr. Camelio's in it. And they should be held to it. That's his interpretation, the prosecution history has his interpretation of these claim terms. And so we're not adding limitations to the specification. The cases like Kara Tech are different than these, than what's happening here.

In Kara Tech, there were two types of claims. One type of claim required a certain feature. The other type of claim did not require the feature. The second type of claims were being asserted, and there is a Markman hearing and claim construction on that second type of claim.

The District Court said that the feature from the first set of claims, which was absent from the second, needed to be in the second, and the Federal Circuit said no, that's not right. That's reading a limitation that's not there. That was taking a whole new limitation and putting it in. What we're doing is we're interpreting the claims, and I think we're giving these claims the only interpretation that is supported by the specification or the file history.

THE COURT: All right. Thank you very much. I hope to get this decision out to you shortly. When we do that, we'll have a conference and plan the next steps. Thank you very much.

MR. ALLAN: Thank you, your Honor.

1 MR. SMITH: Thank you, your Honor.

2 MR. BICKHAM: Thank you, your Honor.

3 THE COURT: I'd like to have the benefit of the
4 transcript when I turn to this, so would somebody order a copy
5 of the transcript.

6 Thank you very much.

7 (Proceedings adjourned)

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